FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

JULY 1988
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DECISIONS

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JULY 1988

Review was granted in the following cases during the month of July:

Dennis L. Wagner v. Pittston Coal Co., Clinchfield Coal Co., MSHA, etc., Docket No. VA 88-21-D. (Interlocutory Review of May 24, 1988 order, Judge Broderick)

Secretary of Labor, MSHA v. Westrick Coal Company, Docket No. PENN 88-119. (Judge Weisberger, May 25, 1988 Default Decision)

Rushton Mining Company v. Secretary of Labor, MSHA, Docket No. PENN 88-99-R. (Judge Weisberger, June 6, 1988)

Secretary of Labor, MSHA v. Westrick Coal Company, Docket No. PENN 88-21. (Judge Weisberger, July 18, 1988, Default Decision)

Beaver Creek Coal Company v. Secretary of Labor, MSHA, Docket No. WEST 88-145-R. (Judge Morris, June 20, 1988)

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 87-343. (Judge Weisberger, June 20, 1988)

Review was denied in the following case during the month of July:

Secretary of Labor, MSHA v. Davidson Mining, Inc., Docket No. WEVA 88-82-R, WEVA 88-168. (Judge Melick, June 21, 1988)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 8, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 88-119
WESTRICK COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

Respondent, Westrick Coal Company, after requesting a hearing to contest an alleged violation, failed to respond to the administrative law judge's pre-hearing and show cause orders. On May 25, 1988 the administrative law judge issued a default decision. Respondent filed a Petition for Discretionary Review on June 24, 1988.

The record does not reveal the reasons for the Respondent's failure to respond to the judge's orders. We grant the petition and vacate the judge's default decision in order to allow this operator, who is apparently acting pro se, an opportunity to present the reasons for these failures, and for the Secretary to interpose any objections to relief from the default decision. Should the judge determine that relief from default is appropriate, he should proceed with the civil penalty issues in this matter.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

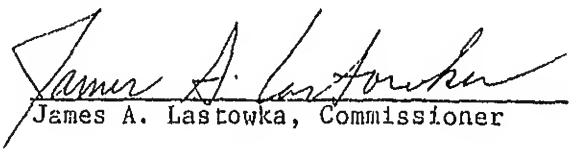
Joyce A. Doyle, Commissioner

Commissioner Lastowka, dissenting:

In my opinion the administrative law judge properly entered an order of default in this proceeding. Indeed, the persistent failure of Westrick Coal Company to do anything to participate in the hearing process left the judge no choice. While I endorse the Commission's previously expressed preference for dispositions on the merits over procedural defaults, that policy cannot be without limits. I believe that to order further proceedings in the circumstances of this case exceeds appropriate bounds.

The Mine Act provides a mine operator with an opportunity for a hearing before this Commission on citations or orders issued by MSHA. Westrick exercised this right by requesting a hearing on citation number 269767. In order to obtain the requested hearing, however, Westrick was required to participate in the hearing process. Westrick ignored every request by the judge and the Secretary that it do so. On March 22, 1988, the judge issued an order directing that the parties confer and exchange information, and noting that failure to do so could lead to default. The record indicates that Mr. Westrick received this order. Westrick did not respond. On March 25 the Secretary sent a letter to Mr. Westrick indicating that attempts to contact him by phone had been unsuccessful and asking Westrick to call the Secretary for purposes of complying with the judge's order. Westrick did not respond. On April 11 the Secretary recited the above chronology in a motion filed with the judge requesting the issuance of a default judgment. Westrick did not respond. On April 21 the judge issued an order directing Westrick to comply by May 2 with his previous order or to show cause why it should not be held in default for failing to respond. The record shows that Mr. Westrick received this order. Westrick did not respond. Accordingly, on May 25 the judge issued a default order. Mr. Westrick's petition for discretionary review of the judge's default order offers no explanation whatsoever for Westrick's persistent failure to heretofore respond and participate in the hearing process. */

In these circumstances the judge committed no error in defaulting Westrick. The judge and the Secretary have followed the proper course in pursuing and resolving this proceeding, yet find themselves having to once again expend their time and resources in an attempt to provide a hearing to a party who declines to participate in the hearing process. Because I believe no error was committed below, I must respectfully dissent from the remand for further proceedings.



James A. Lastowka, Commissioner

*/ Westrick's failure to offer any explanation for its failure to respond distinguishes this matter from other default situations where colorable claims of confusion over procedures or nonreceipt of served documents have been raised. See, e.g., Rivco Dredging Corp., 10 FMSHRC 624 (May 1988); Perry Drilling Co., 9 FMSHRC 379 (March 1987); Patroit Coal Co., 9 FMSHRC 382 (March 1987); Doug Connelly Sand & Gravel, 9 FMSHRC 385 (March 1987).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 13, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 86-225-M
KAISER COAL CORPORATION OF SUNNYSIDE	:	

BEFORE: Ford, Chairman; Backley, Doyle, and Lastowka, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), the issue is whether Commission Administrative Law Judge August F. Cetti erred in finding that Kaiser Coal Corporation of Sunnyside ("Kaiser") violated 30 C.F.R. § 75.205, a mandatory safety standard for underground coal mines that requires "[w]here miners are exposed to danger from falls of ... ribs the operator shall examine and test the ... ribs before any work or machine is started." 1/ 9 FMSHRC 1164 (June 1987) (ALJ). For the reasons that follow, we affirm the judge's finding that Kaiser violated section 75.205.

The essential facts are not in dispute. On March 7, 1986, Jerry Dimick, an employee of a mine equipment service company, arrived at Kaiser's Sunnyside No. 1 mine to examine a malfunctioning stage loader. Dimick was accompanied underground by Kaiser's General Longwall Foreman, Duane Wood. Dimick and Wood traveled to the intersection of the 19th Left Longwall Section and Crosscut No. 28, the area where the stage loader was located. Before Dimick started to inspect the stage loader,

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1/ 30 C.F.R. § 75.205 restates section 302(f) of the Mine Act, 30 U.S.C. § 862(f), and provides:

> Where miners are exposed to danger from falls of roof, face, and ribs the operator shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as may be necessary to insure safety. When dangerous conditions are found, they shall be corrected immediately.

Wood visually examined the ribs at the worksite for signs of instability or hazardous conditions, but he did not perform any physical test of the ribs to verify their condition. Wood then proceeded beyond the stage loader and away from Dimick.

In order to examine the stage loader, Dimick knelt between the rib and the equipment, with his back to the rib. While Dimick was looking at the stage loader from this position, two of Kaiser's section foremen, Gary Kuhns and Darrell Leonard, walked by Dimick. Kuhns testified that because of the position of the stage loader, he had to walk between Dimick and the rib to get by Dimick, and that there was no more than two feet of space between Dimick and the rib. Tr. 91. Both Kuhns and Leonard visually examined but did not physically test the rib as they continued down the entry. While Dimick was kneeling between the rib and the stage loader, a portion of the rib -- approximately six by four by two feet in size -- detached and fell on him. Dimick died that evening from injuries received in the accident.

Inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived at the mine at about 6:00 p.m. on March 7, 1986, to conduct an investigation into the circumstances surrounding the accident. Upon completion of the investigation on March 10, 1986, an MSHA inspector issued to Kaiser a citation pursuant to section 104(a) of the Act. 2/ The citation alleged a significant and substantial violation of section 75.205 and stated:

> A test of the rib condition was not conducted after a visual examination was made for crosscut No. 28 and inby to the longwall face of the 19th Left longwall section. A service representative was performing an examination of a piece of equiptment [sic] that was not operating properly. This person was required to place himself in close proximity to the lower rib. The untested rib fell striking the victim and causing fatal injuries.

The citation was abated on March 10, 1986, after all underground employees at the mine were given hazard training on roof and rib control.

Before the judge, Kaiser argued that it had complied with the requirements of the standard by conducting a visual examination of the

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2/ Section 104(a), 30 U.S.C. § 814(a), provides in pertinent part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this [Act] has violated this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act], he shall, with reasonable promptness, issue a citation to the operator....

rib. Kaiser asserted that, because of the particular rib conditions at the mine, testing of the ribs would be ineffective in detecting flawed ribs that might fall or could even create or enhance the possibility of such falls. Kaiser argued that it was not required under the standard to test the ribs in such circumstances. The judge rejected these arguments, holding that the standard unambiguously requires both visual examination and testing of ribs. He further held that in view of the conditions under which Dimick had to work, he was exposed to a danger of a rib fall and that Kaiser was therefore required by the standard to test the ribs. The judge also found that the violation was of a significant and substantial nature, and he assessed the civil penalty amount of $1,000 for the violation. 3/ 9 FMSHRC at 1176-78. We conclude that substantial evidence supports the judge's finding of a violation of section 75.205.

There is no dispute that the Sunnyside No. 1 mine has a history of unstable ribs. Witnesses for the Secretary and Kaiser agreed that because of this Kaiser's miners and MSHA's inspectors have made it a practice to walk in the center of the entries in order to position themselves as far from the ribs as possible. At the scene of the fatal accident, the travelway between the stage loader and the rib was approximately seven and one-half feet wide, as contrasted with the normal entry width of nineteen and one-half feet. Exhibit 2. In order to work on the malfunctioning stage loader, Dimick had to position himself two feet from the rib, on his knees and with his back to the rib -- a position which left him vulnerable to rib falls from behind. In addition, the inspector testified without dispute that approximately fifteen minutes before the accident, the longwall shearing machine had cut coal in the vicinity of the stage loader and that the shearing process generally causes the ribs to loosen. Tr. 36-37, 104. We agree with the judge that under these circumstances, Dimick was exposed to a danger of a rib fall and that under the standard it was incumbent upon Kaiser to test as well as to examine the ribs before work on the stage loader commenced. In failing to test the ribs, Kaiser violated section 75.205. If Kaiser believes that there may be instances where the testing of the ribs at the mine will diminish safety, we agree with the judge that the remedy lies in petitioning the Secretary for modification of section 75.205 pursuant to section 101(c) of the Act, 30 U.S.C. § 811(c). 9 FMSHRC at 1176-77. See Penn Allegh Coal Co., Inc., 3 FMSHRC 1392, 1398 (June 1981).

Finally, Kaiser asserts that the section 104(a) citation was issued because there had been a fatality, rather than because the inspector believed that there had been a violation of section 75.205. Kaiser argues that, as a result, the citation is invalid and should be vacated. We have reviewed Kaiser's contention and find it to be without merit. Section 104(a) provides that an inspector shall issue a citation "[i]f ... [he] ... believes that an operator of a ... mine ... has violated ... any mandatory health or safety standard." See n.2, supra. Our review of the evidence establishes that the section 104(a) citation

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3/ Review of the significant and substantial finding or of the penalty amount assessed has not been sought.

was issued because the MSHA inspector believed a violation of a mandatory safety standard occurred. See Tr. 42-45. We find that the section 104(a) citation was based on the inspector's belief that, in failing to test the rib, Kaiser had violated section 75.205. That this belief had its genesis in the investigation of a fatal accident at the mine does not undermine the validity of the section 104(a) citation.

The decision of the administrative law judge is affirmed. 4/

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

4/ Commissioner Nelson did not participate in the consideration of or decision on the merits of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 15, 1988

SECRETARY OF LABOR, on behalf of RONNIE D. BEAVERS, et al.	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. WEVA 85-73-D
KITT ENERGY CORPORATION	:	

Before: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the Secretary of Labor on behalf of Ronnie D. Beavers and 25 other miners against Kitt Energy Corporation ("Kitt"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"). The issue presented on review is whether Kitt violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), when it laid off the complainants who were surface miners, notwithstanding their seniority in terms of length of service and their technical ability to perform the remaining underground jobs, solely because they required additional health and safety training under 30 U.S.C. § 825 and 30 C.F.R. Part 48

before they could perform those jobs. 1/ Administrative Law Judge

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1/ Section 115 states in part:

(a) Approved program; regulations

Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--

(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;

(2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this [Act], use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

(3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section;

(4) any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2)

Roy J. Maurer held that the complainants were "miners" within the meaning of the Act and therefore were entitled to the training required by the Mine Act and 30 C.F.R. Part 48. The judge concluded that Kitt, by laying off the complainants, unlawfully interfered with their statutory rights to training in violation of section 105(c)(1) of the Act. 2/ 8 FMSHRC 1342 (September 1986)(ALJ). The judge assessed a

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> or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.
>
> (b) Training compensation
>
> Any health and safety training provided under subsection (a) of this section shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while taking such training, and new miners shall be paid at their starting wage rate when they take the new miner training....

30 U.S.C. § 825(a) & (b).

30 C.F.R. Part 48 implements section 115 of the Act and sets forth the regulatory training requirements for miners.

2/ Section 105(c)(1) provides in pertinent part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
>
> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for

civil penalty of $1,000 for the violation of section 105(c)(1), awarded the complainants back pay, and ordered Kitt to pay attorneys' fees. 4 FMSHRC at 1355; 9 FMSHRC 93 (January 1987)(ALJ). 3/ Because we conclude that the judge granted rights to the complainants beyond the text and intent of section 115, we reverse.

The facts are not in dispute. Kitt owns and operates the Kitt No. 1 Mine, an underground coal mine located at Philippi, West Virginia. Both Kitt and the UMWA, the recognized representative of miners at the mine, are parties to the National Bituminous Coal Wage Agreement of 1981 (the "Wage Agreement"). On August 29, 1983, as the result of a legitimate reduction and realignment of the workforce, Kitt reduced the total underground and surface workforce at the mine from 565 to 210 miners and the surface workforce from 91 to 59. On September 6, 1983, Kitt laid off 43 more miners, reducing the total workforce to 167 miners and the surface workforce to 15.

To determine which employees would be retained in the jobs remaining after each layoff, Kitt was bound by the Wage Agreement. Article XVII(b)(1) of the Wage Agreement provides:

> In all cases where the workforce is to be reduced, employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work.

"Seniority" is defined in Article XVII(a) of the Wage Agreement as "length of service and the ability to step into and perform the work of the job at the time the job is awarded." In deciding whether a miner had such "ability to step into and perform the work of the job," Kitt considered whether the miner met the "experienced miner" definitions of 30 C.F.R. Part 48, 30 C.F.R. §§ 48.2(b) and 48.22(b). 4/ Kitt deter-

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> employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

3/ Before the judge, the United Mine Workers of America ("UMWA") sought and was granted the right to participate in the case as an intervenor.

4/ 30 C.F.R. § 48.2(b) defines "experienced [underground] miner" as:

> [A] person who is employed as an underground miner, as defined in paragraph (a)(1) of this section, on the effective date of these rules; or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12 months; or a person who has had at least 12 months experience working in an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in § 48.5 (Training of new

mined that in order to be retained as an employee and to be assigned one of the remaining jobs at the mine, a miner was required to have training or prior experience as defined by the regulations or to have been employed underground on October 13, 1978, the effective date of the training regulations (the "Grandfather Provision").

At the time of Kitt's reduction of its workforce, the complainants were surface miners who sought to be employed in underground positions remaining at the mine. Of the 26 complainants, 23 did not qualify as "experienced miners" pursuant to 30 C.F.R. § 48.2(b) and therefore required safety and health training before Kitt would consider them eligible to work underground. Because they lacked the appropriate underground training they were laid off by Kitt. (Three other complainants qualified as "experienced miners" by virtue of the Grandfather Provision, but were laid off due to Kitt's mistaken belief that they were not qualified.) The parties stipulated that had Kitt not interpreted the Wage Agreement to require underground training, the complainants would have been placed in the jobs that they sought. The parties also agreed that all of the miners who were retained as Kitt's employees in the underground positions sought by the complainants qualified as experienced miners in accordance with Kitt's policy.

On or about September 7, 1983, MSHA advised Kitt that use of the training provisions as a basis to lay off miners conflicted with MSHA's training regulations and that the laid off employees should be recalled. Kitt disagreed with MSHA's position, but in order to limit its exposure to potential civil penalties and damages, Kitt abandoned its policy of laying off surface miners who required underground health and safety training. On September 13 and 14, 1983, Kitt recalled the complainants to work and provided them with the necessary training to permit them to work underground.

Subsequently, the complainants filed a complaint with MSHA alleging that they had been unlawfully discriminated against when they were laid off by Kitt. In addition, the UMWA challenged the experienced miner policy through the arbitration procedure of the Wage Agreement. On February 24, 1984, the arbitrator held that Kitt's interpretation of the phrase "ability to step into and perform the work of the job" to

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miners) of this Subpart A.

30 C.F.R. § 48.22(b) defines "experienced [surface] miner" as:

> [A] person who is employed as a miner, as defined in paragraph (a)(1) of this section, on the effective date of these rules; or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12 months; or a person who has had at least 12 months' experience working in a surface mine or surface area of an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in § 48.25 (Training of new miners) of this Subpart B.

include a requirement that a miner meet the "experienced miner" definitions of 30 C.F.R. Part 48 did not violate the Wage Agreement.

On January 8, 1985, following an investigation of the complainants' allegations, the Secretary filed a complaint with the Commission on the complainants' behalf. The complaint asserted that by laying off the complainants because they lacked underground training, Kitt had violated section 105(c) of the Mine Act. The complaint requested that Kitt be ordered to reimburse the complainants for all backpay and damages resulting from the layoff. Judge Maurer decided the case on the basis of stipulated facts and cross-motions for summary decision. In holding for the complainants, the judge focused upon the fact that when the complainants were laid off they were "miners" within the meaning of the Mine Act and therefore were entitled, in the judge's view, to the training granted by section 115 and Part 48. The judge stated:

> The fact that all the employees of Kitt who were considered for lay off were "miners" within the meaning of the Act at the time the operator picked and chose among them based on the federal training requirements is ... decisive in this case. As "miners", the complainants ... were entitled to whatever training was required under section 115. By laying off these complainants rather than providing the required training, the operator interfered with their statutory right to training under section 115.

8 FMSHRC at 1354. 5/

The Commission granted Kitt's petition for discretionary review. The principal question on review is whether the judge erred in concluding that the complainants enjoyed a statutory and regulatory right to obtain the training that would have entitled them to assignment to the remaining underground jobs.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of prohibited discrimination under section 105(c) of the Act, the complainant bears the burden of proving (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United

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5/ The judge also found that the three complainants who qualified as experienced miners under the Grandfather Provision, but who Kitt mistakenly believed would need training, were unlawfully discriminated against because they were laid off based upon Kitt's "perceived lack of federally mandated training" on the part of the miners. 8 FMSHRC at 1354.

Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC 813 F.2d 639, 642 (4th Cir. 1987), Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

If the complainant does not establish that he engaged in a protected activity, the discrimination complaint must fail. The judge concluded that "[t]he insistence of the complainants on their right to be provided training ... is activity protected by the Act." 8 FMSHRC at 1354. Thus, the initial question, and the one dispositive of this case, is whether under the Mine Act the complainants had a protected right to the training at issue here.

Section 115(a) of the Mine Act provides that "new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground." The complainants in this case were "miners" since at the time of the alleged act of discrimination they fell within the broad definition contained in section 3(g) of the Mine Act. 6/ Under the Secretary's regulations implementing section 115(a) of the Mine Act, the complainants were "new miners having no underground experience" because they did not have the requisite degree of underground training or experience set forth in 30 C.F.R. § 48.2(b) and (c), supra. As a consequence, under the Mine Act Kitt could not have transferred the complainants to underground positions without providing them training. Instead, Kitt laid off complainants in favor of other miners who already were qualified as experienced underground miners and thus did not require additional section 115(a) training. We conclude that in asserting that Kitt's policy in choosing miners for layoff contravened the Mine Act, complainants claim too broad a statutory right to operator-provided training.

In Peabody Coal Co., 7 FMSHRC 1357, 1363 (September 1985), and Jim Walter Resources, 7 FMSHRC 1348, 1354 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), the Commission concluded that mine operator policies to bypass for rehire laid-off individuals because those individuals lacked current safety and health training required by the Mine Act did not constitute discrimination under the Mine Act. The Commission determined that

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6/ Section 3(g) of the Act provides:

> For the purpose of this [Act], the term --
>
> * * *
>
> "miner" means any individual working in a coal or other mine.

30 U.S.C. § 802(g).

section 115 of the Act grants training rights to "new miners" and that laid-off individuals do not become entitled to the training rights of section 115 until they are rehired as miners. Thus, since there is no statutory right to operator-provided training for those on lay off status, we concluded that an operator's refusal to rehire a laid-off individual due to lack of required training does not violate the Mine Act.

In Peabody and in Jim Walter the Commission stressed that the Mine Act is a health and safety statute, not an employment statute. The Commission noted that in enacting section 115 Congress was concerned with preventing "the presence of miners ... in a dangerous mine environment who have not had ... training in self-preservation and safety practices." S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637-38 (1978). The Commission determined that the rights of particular laid-off individuals to recall, including the extent to which an operator can favor for recall fully trained persons over persons with greater length of service, properly are within the sphere of collective bargaining and arbitration. 7 FMSHRC at 1364; 7 FMSHRC at 1354.

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision. Brock v. Peabody Coal Co., supra, 822 F.2d 1134. In its decision the D.C. Circuit also emphasized that the purpose of section 115 of the Mine Act and the Secretary's training regulations is to protect the health and safety of miners. 822 F.2d at 1146. The court summarized the purpose of sections 115 and 104(g) 7/ as follows:

> Sections 115(a) and 104(g)(1) of the Act therefore confer upon a "miner" the right not to "work" or to be "employed" in the mines without having first received the requisite training. Put more simply, the Act accords a miner the right not to be placed in a dangerous environment without the benefit of proper safety training. In order to protect this central statutory right, Congress in 1977 amended section 105(c)(1) and inserted section 104(g)(2), thereby conferring upon a miner the corollary right not to be discharged or otherwise discriminated against either when he or she exercises the right by

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7/ Section 104(g)(1) of the Act, 30 U.S.C. § 824(g)(1), requires the Secretary to withdraw from a mine any miner who has not received the requisite safety training required by section 115 of the Act. Section 104(g)(2) provides that no miner withdrawn from a mine pursuant to section 104(g)(1) of the Act shall be discharged or discriminated against as a result of the withdrawal and further provides that such miner shall not suffer loss of compensation during the period necessary for such miner to receive the requisite safety training required by section 115 of the Act.

> refusing to work without having received the required training or when the Secretary issues an order withdrawing that miner from the mine.

822 F.2d at 1147 (footnotes omitted). The court stated that it could not "infer from the Act that Congress intended privately-bargained contracts to determine who is or is not a miner entitled to receive the section 115 safety training." 822 F.2d at 1148. The court concluded by holding that "[n]either the language Congress employed nor the legislative history supports the Secretary's contention that Congress intended to require 'training neutral' hiring." 822 F.2d at 1151.

We recognize that the complainants in the instant case, unlike the complainants in Peabody, were "miners" at the time the alleged act of discrimination occurred. This distinction, however, does not require a different result because in the crucial and controlling respect, this case and Peabody are the same. In both cases, the operator chose for placement in underground mining positions persons who by training or experience fully met the training requirements of section 115 of the Act and the Secretary's implementing regulations. In placing trained miners underground the operator did not violate the language of the Mine Act or the safety and health objectives of the training requirements. To the contrary, the Act's purpose was fulfilled. In addition, no miner was discharged or otherwise discriminated against either because of a refusal to work without having the required training or because of a withdrawal from the mine pursuant to an order issued by the Secretary under section 104(g) of the Act due to a lack of training. See 822 F.2d at 1147. In sum, the Secretary's argument that section 115 of the Mine Act mandates that "training neutral" employment decisions be made by mine operators is just as wide of the mark in the present situation as it was in Peabody, and must be rejected here for the same reasons.

In order to reach the result argued for by the Secretary and the UMWA, we would be required to go beyond the Act and examine the Wage Agreement. It is not the Commission's province, however, to interpret the rights and obligations mandated by the Act through an interpretation of a private contractual agreement unless required to do so by the Act itself. Peabody, supra, 7 FMSHRC at 1364. In holding that the complainants as "miners" had the right to whatever training was required to continue their employment, the judge misperceived the proper focus of section 115. To require an operator to train miners for underground work so that they, rather than other miners, would have the opportunity for continued employment would transform section 115 from a health and safety provision to an employment provision. This type of employment issue is appropriately resolved through the collective bargaining and grievance and arbitration process. Indeed, the issue of the validity of Kitt's experienced miner policy was pursued through the contractual grievance process and Kitt's position was upheld. Stip. 9. 8/

8/ The Secretary argues that Kitt's use of the experienced miner policy to determine whom to retain as employees "will always bar miners from being awarded jobs if training is required" and will prevent training rights from ever "com[ing] into play." S. Br. 14. On the

Finally, we are left with the UMWA's argument that when enacting section 115 Congress could not have intended that miners who would not otherwise have been laid off would lose their employment as the result of the application of the Mine Act's training requirements. Whatever one might speculate as the intention of Congress in this respect, the fact is that neither the language of the Mine Act nor the legislative history support the assertion of the complainants. 9/ If there is a problem, it lies within the Act itself, and any remedy is through the collective bargaining process or, as Judge Ruth Bader Ginsburg stressed in her concurring opinion in Peabody, through legislative amendment by Congress. Peabody, 822 F.2d at 1152-53.

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contrary, training rights always "come into play" when the experienced miner policy is invoked. All miners chosen by Kitt to work had the necessary health and safety training.

We also reject the Secretary's argument purporting to be based on Wygant v. Jackson Board of Education, 476 U.S. 267 reh'g denied, 478 U.S. 1014 (1986), that Kitt's experienced miner policy unlawfully interferes with the complainants' property interest in and expectation of continued employment. Supp. Br. Sec. 2-6. That argument does not consider the fact that the Mine Act is not an employment statute. Moreover, in Wygant the Court was careful to note the difference between unconstitutional and permissible infringements upon a worker's property interest in a job.

9/ The conclusion that Kitt did not violate the Act makes it unnecessary for us to address two additional issues raised in Kitt's petition for discretionary review, i.e., that the judge erred in assessing a civil penalty for the violation of section 105(c) and in awarding attorneys' fees to counsel for the UMWA. We note, however, that the Secretary failed to include in the discrimination complaint a proposal for a specific civil penalty for the alleged violation of section 105(c). Commission Procedural Rule 42(b), 29 C.F.R. § 2700.42(b), requires such a proposal. See also Secretary on behalf of Milton Bailey v. Arkansas Carbona Co. and Michael Walker, 5 FMSHRC 2042, 2044 (December 1983).

Accordingly, we reverse the conclusion of the judge that Kitt discriminated against the complainants by violating their statutory rights with regard to training. The judge's assessment of a civil penalty and the judge's award of damages and attorneys' fees are vacated.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 20, 1988

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION	:	
v.	:	Docket No. PENN 88-21
WESTRICK COAL CO.	:	

BEFORE: Doyle, Lastowka, and Nelson, Commissioners

ORDER

BY: Doyle, Lastowka, and Nelson, Commissioners

In this civil penalty proceeding respondent Westrick Coal Company ("Westrick") failed to timely respond to the administrative law judge's pre-hearing order. Accordingly, on June 30, 1988, the judge issued an order requiring Westrick to respond by July 11, 1988 or to show cause why the matter should not be dismissed. On July 11, 1988, Westrick, who is acting without an attorney, wrote to the judge in response to the show cause order. The letter was mailed on July 13, 1988, but was not received by the judge until July 18, 1988. In the meantime, on July 15, 1988, the judge found Westrick in default, dismissed the proceeding, and ordered Westrick to pay the assessed civil penalty. Because his jurisdiction over this matter had ended with issuance of the default order, the judge forwarded Westrick's response to the Commission.

In order that the judge may consider Westrick's response to his previous orders, we vacate the judge's default order and remand for further proceedings.

For the Commission:

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 30, 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 87-352 A. C. No. 46-01436-03699
v.	:	Shoemaker Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Anita D. Eve, Esq., Office of the Solicitor, U. S. Department of Labor, Pittsburgh, Pennsylvania, for Petitioner.
Paul T. Boos, Esq., Consolidation Coal Company, Wheeling, West Virginia, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company for six alleged violations. All involve 30 C.F.R. Part 50.

Citation Nos. 2945442, 2945443, 2945446, 2945455, 2945456

These citations were originally assessed at $250 each. The parties have agreed to settle them for $170 apiece. 1/ The Solicitor advises that in these cases the miners failed to report the alleged injuries promptly and the operator had reason to believe the injury was nonoccupational and occurred off mine

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1/ The Solicitor's settlement motion erroneously includes Citation No. 2945453. This item was deleted from the assessment sheet filed with the Solicitor's penalty petition and was not in the petition itself. Obviously, it was settled, paid, or otherwise disposed of previously. The Solicitor has confirmed this by telephone.

property. The negligence factor is therefore, greatly reduced. After considering these matters in light of six statutory criteria set-forth in section 110(i) of the Federal Mine Safety and Health Act of 1977, I conclude the settlements may be approved.

Citation No. 2899820

This item involves an alleged violation of 30 C.F.R. § 50.20(a). However, it was not settled and was heard on the merits on May 17, 1988.

The subject citation reads as follows:

> "The mine operator did not fill out and mail to M.S.H.A. within 10 calander [sic] days, Form 7000-1, "Mine accident, Injury and Illness Report," for an occupational injury that occurred to Donald Chamber on 12.5.85, which resulted in lost work days."

Section 50.20(a), 30 C.F.R. § 50.20(a), of the regulations provides:

> (a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. * * * The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.
>
> * * *

And section 50.2(e) 30 C.F.R. § 50.20(e) states:

> (e) "Occupational injury" means any injury to a miner which occurs at the mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

On December 5, 1985, Donald Chambers, a mechanic at the operator's Shoemaker mine, left the mine because he was suffering chest pains. Later that day he was admitted to Reynolds Memorial Hospital where he subsequently was diagnosed as suffering a myocardial infarction. Five days later he had a stroke. He was then transferred to Western Pennsylvania Hospital where cardiac catheterization disclosed a blockage in the anterior descending branch of the left coronary artery which practically totally occluded the vessel (Exhibit D). He was discharged from Western Pennsylvania Hospital on January 4, 1986. The evidence also discloses that Mr. Chambers is a long-standing diabetic and a heavy smoker (Tr. 23, 50). Mr. Chambers admitted that until the time of the heart attack he smoked a pack a day or two packs every three days (Exhibit N, p. 13; Tr. 50).

A dispute exists over the etiology of Mr. Chambers' chest pains. Hospital records upon admission to Reynolds Memorial state that Mr. Chambers reported chest pains of three days duration (Exhibit B). In the discharge summary dated December 30, 1985, Dr. Baysal, Mr. Chambers' personal physician, stated that upon admission the duration of symptoms were a little bit questionable, but nevertheless appeared to be of 24 hours duration (Exhibit C, p. 1). Dr. Baysal also reported in the discharge summary that on December 16, Mr. Chambers and his family told him that Mr. Chambers had been struck with a live electrical wire at work on the day of admission and that the chest pains developed about 1/2 hour to one hour following this incident (Exhibit C, p. 2). In his subsequent deposition dated May 13, 1987, during the workmen's compensation proceedings, Dr. Baysal changed his story and stated that Mr. Chambers had told him about the electrical shock one or two days after his hospital admission (Exhibit O, p. 12). In his first workmen's compensation deposition dated August 20, 1986, Mr. Chambers asserted he had had no chest pains until after the electrical shock (Exhibit N, p. 6). But in his second deposition, a year later on September 11, 1987, he stated he had had indigestion for about three days before the heart attack (Exhibit M, p. 6). He repeated the indigestion allegation at the hearing in this proceeding, asserting that indigestion was the pain referred to in the hospital admission reports (Tr. 24, 45). At the present hearing, Mr. Chambers admitted he had not reported the alleged electrical shock to anyone at the mine before he left (Tr. 16, 42).

There is also a dispute in the medical evidence over whether the electrical shock, assuming it did occur, caused Mr. Chambers' heart attack. Dr. Baysal expressed the opinion that the electrical shock had caused the infarct, noting that Mr. Chambers previously had been asymptomatic from the standpoint of a pre-existing heart condition (Exhibit O, pp. 12 & 13). However, Dr. Baysal admitted that Mr. Chambers showed no evidence of a burn or coagulation necrosis from the alleged shock (Exhibit O, p. 40). Dr. Baysal also referred to the fact that a single vessel disease is rare in a diabetic (Exhibit O, p. 14).

Dr. Wurtzbacher, a consultant engaged by Consol to review the medical evidence, expressed medical opinions contrary to those of Dr. Baysal. Dr. Wurtzbacher stated that there was no medical evidence of a direct relationship between the electrical shock and subsequent myocardial infarction (Exhibit F). He further stated that although multiple vessel atherosclerosis is seen in most cases involving diabetics, a single vessel disease in diabetics can be seen infrequently (Exhibit G). Finally, he described the cardiac symptoms and failures as caused by diabetes (Exhibit G).

The Secretary's allegation of a reporting violation is based upon the assertion that Mr. Chambers suffered an electrical shock which constituted a reportable injury under Part 50. The Solicitor also argues that even if there was no electrical shock, a report should have been made because Mr. Chambers had chest pains at the mine.

After a review of all the evidence I find that Mr. Chambers was not shocked on December 5, 1985. I carefully observed and listened to the testimony of Mr. Chambers and his co-worker Mr. McLaughlin regarding the alleged occurrence of an electrical shock. I did not find them credible. As already noted, Mr. Chambers changed his story several times and as the operator's brief points out, his account became more elaborate and detailed -- and more obviously self-serving, with each telling. If the alleged shock were as severe as he alleged, it is incredible he did not tell anyone about it at the time. The same is true of Mr. McLaughlin's testimony, because he also told no one about the alleged shock. I find persuasive the contemporaneous evidence which shows that when admitted to the hospital, Mr. Chambers did not relate anything about an electric shock, but rather described chest pain of three days duration. I also note the section foreman's testimony that on December 5 Mr. Chambers complained of chest pain upon entering the mine before he began working (Tr. 96, 97). In addition, on the discharge summary dated December 30, 1985, Dr. Baysal, described chest pain on admission as having been present for 24 hours and said that Mr. Chambers did not allege an electrical shock until December 16, ten days after his hospital admission (Exhibit C).

Dr. Baysal's subsequent turnabout with respect to when Mr. Chambers first told him about the alleged shock, is not convincing. Even apart from the fact that the Secretary failed to produce Dr. Baysal to testify in these proceedings thereby resulting in his unavailability for cross-examination by the operator, Dr. Baysal's contradictory statements fall far short of providing a basis for the Secretary to sustain her burden of proving a shock occurred. In addition, Mr. Chambers had no evidence of burns and he never was unconscious (Tr. 36-38). Based upon the foregoing, I conclude Mr. Chambers did not suffer

an electrical shock and therefore, the operator committed no violation in failing to report it.

I reject the Solicitor's argument (p. 11 of her brief) that even if an electrical shock did not occur, a violation occurred because the operator was obliged to report Mr. Chamber's chest pains. The MSHA publication "Information Report on 30 C.F.R. Part 50" February 1980 attached to the Solicitor's brief as Government Exhibit 7, states in pertinent part at page 6:

> "* * * The MSHA management concept on a dividing line between injury and illness states that an injury results from a recognizable single incident, i.e., a worker harmed by a single incident would be injured. * * *"

The Solicitor attempts to describe the heart attack as a single event which had to be reported. But she offers no evidence to show when the heart attack occurred and cannot equate the particular chest pains Mr. Chambers experienced at the mine with the precise onset of the heart attack, since he had been having such pains long before he went to work on December 5. Therefore, these chest pains were not a recognizable single incident within the meaning of the regulations and MSHA publication.

Finally, the Commission's decision in Freeman Mining Company, 6 FMSHRC 1577 (July 1984), is of no benefit to the Solicitor here. In that case the Commission referred to an injury as "an act" that damages, harms or hurts, 6 FMSHRC at 1578. Once again, there is no such single act present in this case. And the issue of causal nexus is not involved here as it was in Freeman. If an electrical shock had occurred here, there would be no question that it was work related, which was the question presented in Freeman. If there had been a shock, the only inquiry would be whether it had any of the prescribed consequences such as medical attention or lost work days. Even assuming an electrical shock had occurred, I still would not find a violation. Medical attention and lost work days resulted from a heart attack, which the great weight of the evidence demonstrates was in turn caused by long-standing diabetes and heavy smoking, not from the electric shock as the Secretary alleges.

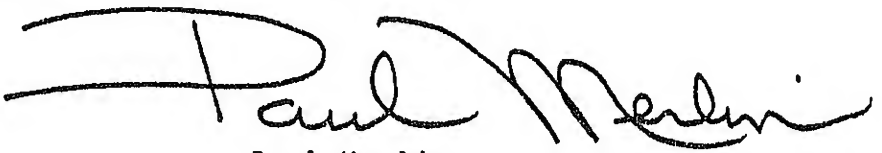
Accordingly, I conclude there was no violation and that Citation No. 2899820 must be VACATED, and that the penalty petition be dismissed insofar as this citation is concerned.

As indicated above, the briefs filed by counsel which were most helpful, have been carefully reviewed. To the extent they are inconsistent with anything herein, they are rejected.

ORDER APPROVING PARTIAL SETTLEMENT
ORDER TO PAY
ORDER OF PARTIAL DISMISSAL AND VACATION

As set forth herein, the proffered five settlements for Citation Nos. 2945442, 2945443, 2945446, 2945455 and 2945456 are Approved and in accordance therewith, the operator is ORDERED TO PAY $850 within 30 days from the date of this decision.

As further set forth herein, the Secretary's penalty petition is DISMISSED insofar as Citation No. 2899820 is concerned and that citation is VACATED.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 1 1988

DWIGHT BAUM, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 88-203-D
ROCHESTER AND PITTSBURGH COAL CO., Respondent	:	PITT CD 87-16

ORDER OF DISMISSAL

Before: Judge Weisberger

On June 23, 1988, Complainant filed a Motion to Withdraw in which he moved to withdraw his request for hearing in the above captioned matter. Accordingly, this Motion is granted.

It is ordered that the above case be DISMISSED. In consequence of this order, Respondents Motion for Summary Decision is declared MOOT.

Avram Weisberger
Administrative Law Judge

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JUL 1 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 87-88 A.C. No. 05-00301-03609
v.	:	Dutch Creek No. 1 Mine
MID-CONTINENT RESOURCES, INC., Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA, Intervenor	:	
AMERICAN MINING CONGRESS, Amicus Curiae	:	

ORDER OF DISMISSAL

Before: Judge Morris

The issues involved here arise from the federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., ("Mine Act" or "Act").

At issue is whether the judge should grant the Secretary's pending motion to withdraw her complaint proposing a civil penalty or, in the alternative, deny the Secretary's motion and grant respondent's motion for declaratory relief.

A resolution of the issues requires a review of the development and present status of this case.

PROCEDURAL HISTORY

1. On March 16, 1987, the Secretary filed a civil penalty against respondent Mid-Continent Resources, Incorporated. The complaint proposing the penalty arose from Citation No. 2213910, issued to Mid-Continent pursuant to § 104(a) of the Act.

The citation charges Mid-Continent with violating § 103(f) of the Act. The citation describes the following violative practice:

> On 5/13/86, Donald Ford, Safety Department refused to Robert Butero, a designated representative of the miners, the right to accompany Mike Horbatko, an authorized representative of

the Secretary. During an inspection of the Dutch Creek No. 1 Mine. The inspection was being conducted pursuant to 103 (a) of the Federal Mine Safety and Health Act of 1977.

2. Section 103(f) of the Act, allegedly violated here, provides as follows:

> "(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. On August 21, 1987 the judge stayed the proceedings because he believed certain controlling cases were pending before the Commission.

4. On October 16, 1987 the stay was dissolved and the case subsequently set for a hearing.

5. In due course the United Mine Workers of America ("UMWA" was granted party status and the American Mining Congress, ("AMC"), was granted leave to appear as Amicus Curaie.

6. Mid-Continent's amended answer to the Secretary's complaint alleged, in effect, that the designation of the miners representative was invalid (Paragraph 20, Amended Answer).

7. On November 23, 1987, the Secretary moved to withdraw his petition for assessment of a civil penalty. His motion admitted

that after a review and investigation the representative of miners' form was:

> ... signed by two employees (one of whom was then off-work, permanently injured, had no intention of returning, and was unable to return to active employment at Mid-Continent ...
>
> In addition, his motion states that:
>
> "[c]onsequently, the individual was not an active miner at the time the representative of miners' form was filed with the Mine Safety and Health Administration. In light of the truth of this allegation and the fact that only two people signed the designation (see Respondent's Answer, Exhibit No. 5), the citation and order have been vacated by the Secretary."

8. Mid-Continent opposed the Secretary's motion to withdraw his proposal for penalty and further moved for declaratory relief.

9. Mid-Continent's opposition to the Secretary's motion states, in part, as follows:

A) That a major issue raised by the proceeding is whether a nominal number of workers can properly designate a union such as the UMWA as their walk-around representative under 30 C.F.R. Part 40 when the designated union is not a union which represents employees at the mine under the Labor Management Relations Act, as amended, 29 U.S.C. §§ 141 et seq. Mid-Continent further asserts the issue was exacerbated in this instance by virtue of the fact that the UMWA was at the very time of the disputed designation in the process of an unsuccessful effort to obtain designation as the collective bargaining representative of Mid-Continent employees by the National Labor Relations Board.

B) Further, Mid-Continent contends the Secretary's position is that any two or more employees may execute a designation under 30 C.F.R. Part 40. As a result a non-employee union representative may gain access to Mid-Continent's mine, or any other mine, regardless of whether that union has been designated a collective bargaining representative of employees by the National Labor Relations Board or whether the designated union is, in fact, or in law, truly "representative'.

C) Mid-Continent further states that since AMC is appearing as Amicus Curiae the problems arising here are demonstrative of similar situations throughout the industry.

D) Further, to allow the Secretary to withdraw his civil penalty without allowing this matter to move forward would deprive Mid-Continent of its efforts to date.

E) Mid-Continent also anticipates being confronted with the identical issue in the near future. The 12-month organizational/ election immunity created under Section 9(e)(2) of the National Labor Relations Act, 29 U.S.C. § 159(c)(2) between Mid-Continent and the UMWA expired in December 1987.

F) Further, Mid-Continent faces civil penalties under Section 110(a) and (b) of the 1977 Mine Act and face a choice of either complying with the Mine Act (which is in clear conflict with the Labor Management Relations Act) or risk greater penalties under Section 110 of the Mine Act, including the possibility of criminal sanctions. Accordingly, Mid-Continent should be permitted the opportunity to litigate these matters rather than risk penalty alternatives.

G) No claim has been made that the Secretary anticipates reformulating her position on the propriety of a non-employee union representative (who was not selected as a representative of employees under the Labor Management Relations Act). Specifically, Mid-Continent contends this circumvents the National Labor Relations Board and obtains ostensible authority under the Mine Act when said representative is not, in law or fact "representative". Thus, both the factual and legal issues involved are significantly narrower than those involved in Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 453 (10th Cir. 1983).

H) According to Mid-Continent a further issue is whether the issuance of the citation contravened the prohibition of advance notice under Section 110(e) of the Mine Act. This issue arises from certain facts urged by Mid-Continent. Thus, if the case is not allowed to proceed to declaratory relief then Mid-Continent requests the matter be referred to the Department of Labor and the Department of Justice for review of potential prosecution for a violation of Section 110(e).

10. On December 23, 1987 the judge cancelled the scheduled hearing in Glenwood Springs, Colorado and gave the parties 15 days to state their views as to whether Mid-Continent should be permitted to proceed with its request for declaratory relief.

11. On March 29, 1988, the Commission issued its decision in Emery Mining Corporation, 10 FMSHRC 276.

12. The parties were given an opportunity to comment on the effect of Emery as it related to the facts involved in the instant case. The Secretary and UMWA oppose Mid-Continent's motion. Amicus Curiae, AMC, supports Mid-Continent's position.

Discussion

As a threshold matter it appears that the Commission has jurisdiction in this case. Section 110(k) of the Act prohibits compromise, reduction or settlement of proposed penalties, once contested, without Commission approval. Commission Rule 30(a), 29 C.F.R. § 2700.30(a); Kocher Coal Co., 4 FMSHRC 2123 (1982).

It further appears the Commission, in its discretion, may grant declaratory relief under section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e); Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir. 1983).

The pivitol issue is whether the Commission should exercise its discretion and grant declaratory relief.

Mid-Continent's prinicipal contention focuses on the point that in Emery the miners' were represented by the UMWA. On the other hand, Mid-Continent was union free at the time of the citation contested herein. It has, in fact, been union free since November, 1981.

Emery clearly stands for the proposition that the rights of miners' representatives broadly extends to non-employees. The undersigned judge is obliged to follow the Commission rulings. New Jersey Pulversing Company, 2 FMSHRC 1686 (1980). Accordingly, on this point Mid-Continent could not prevail.

Mid-Continent further contends that permitting access to its mine by a UMWA representative would clearly conflict with the National Labor Relations Act.

However, in Emery Mining Corporation, the trial judge addressed an issue of whether Emery's waiver of liability policy might violate the laws of the State of Utah. 8 FMSHRC at 1206. On appeal the Commission observed that the proper concern was whether Emery had violated the Mine Act. Specifically, the Commission expressed no opinion on any question concerning state law, 10 FMSHRC 289, fn. 11. It would accordingly appear that any relief on this point would lie with the NLRB and not the Commission.

Mid-Continent also argues that the Commission decision deals with a union representative recognized under the NLRB law. However the decision does not address the inherent conflict between the criminal provisions relating to prohibitions on prior notification of inspections in Section 110(e) of the Mine Act and the necessity for prior notification to be given to a non-employee walk-around representative, if the walk-around designation is to be anything other than illusory. It is claimed that the fortuity of a union organizer and inspector both showing up at 6:30 a.m.

is the one fact in this matter which will rarely occur absent prior notification. This problem, according to Mid-Continent, can be ameliorated somewhat in a situation where a union has already been selected by employees. However, there is no way to ameliorate it where, as here, the walk-around designation is being used as a subterfuge to gain access to company property contrary to the Labor-Management Relations Act.

I disagree. The date and time of regularly scheduled mine inspections, as mandated by the Act, would probably be common knowledge to any interested miner at the site. In addition, in any event it is the function of this judge to adjudicate issues under the Mine Act, not the Labor Management Act.

For the foregoing reasons the motion of Mid-Continent for declaratory relief is denied and I enter the following:

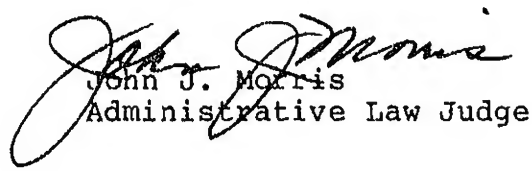
ORDER

1. The motion of respondent for declaratory relief is denied.

2. The motion of the Secretary to withdraw his petition for assessment of a civil penalty is granted.

3. The proposed penalty is vacated.

4. The case is dismissed.



John J. Morris
Administrative Law Judge

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Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.O. Drawer 790, 818 Colorado Avenue, Glenwood Springs. CO 81602

Mary Lu Jordan, Esq., Michael H. Holland, Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. 20005

Charles W. Newcom, Esq., Sherman & Howard, 633 Seventeenth Street, Suite 3000, Denver, CO 80202

Edward M. Green, Esq., and Mark G. Ellis, Esq., American Mining Congress, 1920 N. Street, N.W., Suite 300, Washington, D.C. 20036

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 5 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 87-53-M
	:	A. C. No. 41-00022-05501 B96
v.	:	
	:	Dallas Quarry & Plant
F & E ERECTION COMPANY, INC., Respondent	:	

DECISION

Appearances: Rebecca A. Siegel, Esq., Office of the Solicitor, Department of Labor, Dallas, Texas, for the Secretary;
Michael Black, Esq., Burns and O'Gorman, San Antonio, Texas, for Respondent

Before: Judge Weisberger

Statement of the Case

In a telephone conference call initiated by the undersigned with Counsel for both Parties on November 27, 1987, to determine the status of the case, it was indicated that Counsel were discussing a possible settlement of the case. On March 1, 1988, the Parties submitted a joint Motion to Approve a Settlement Agreement proposing a reduction in penalties from $8,000 to $3,000. It was determined that the Motion, and accompanying documents, did not contain sufficient information to allow approval of the settlement. A hearing was scheduled for April 12, 1988, in San Antonio, Texas, to allow the Parties to present evidence in support of the Motion to Approve Settlement. On April 12, 1988, the case was adjourned due to the sudden death that morning of Respondent's Superintendent Steven Harless.

Subsequent to notice a hearing was held on May 19, 1988, on the Motion to Approve Settlement. I have considered the representations, documentation, and testimony submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $3,000 within 30 days of this order.

Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JUL 12 1988

RIVCO DREDGING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 88-23-R
	:	Citation No. 2985271; 9/17/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 88-24-R
	:	Citation No. 2985272; 9/17/87
	:	River Dredge Mine
	:	Mine ID 15-12672

ORDER OF DISMISSAL

Before: Judge Maurer

It is undisputed that the two citations at bar (Nos. 2985271 and 2985272) were issued on September 17, 1987, and that Contestant did not notify Respondent or the Commission of its intent to contest the citations until the MSHA office in Pikeville, Kentucky received a notice of contest on October 21, 1987. The Commission was not forwarded notification until November 16, 1987, when it received the correspondence via the Department of Labor.

Under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the operator must notify the Secretary of its intent to contest a citation within 30 days of its receipt. Here, the Secretary was notified only after the 30 days had elapsed. The contests were accordingly filed untimely and are therefore DISMISSED. Alexander Bros., Inc., 1 MSHC 1760 (1979); Island Creek Coal Co., 1 MSHC 2143 (1979).

Because this dismissal is on jurisdictional grounds, and this Commission is without subject-matter jurisdiction over the citations at bar in these contest proceedings, I find Rivco's failure to contest the associated proposed civil penalty assessments because Mr. Wilson did not recognize or understand the need to also file such a contest to be a moot point herein, having no bearing on these two contest proceedings.

Regardless of Rivco's reasons for failing to contest the associated civil penalty proposals, the fact is that a long line of precedent going back to the Interior Department's former Board of Mine Operations Appeals holds that the 30-day time limit prescribed in the statute for the filing of an application for review is a statutory limitation on the Commission's authority to review such an application and is jurisdictional. Freeman Coal Mining Corp., 1 MSHC 1001 (1970).

Therefore, even if I should find that Rivco's failure to contest the associated civil penalty proposals was due to the excusable neglect, mistake or inadvertence of the operator, it would not serve to create subject-matter jurisdiction where none heretofore existed, i.e., in these two contest proceedings.

Apropos that point, I also note for the record that unlike the M. M. Sundt Construction Co., 1/ and Kelley Trucking Co., 2/ cases referred to by the Commission in its Order of May 26, 1988, there are no civil penalty cases before me which could serve as the potential vehicle to give equitable relief to the operator herein should that be appropriate because the Secretary has never filed and presumably does not intend to file a Complaint Proposing Penalty concerning these two citations. Under those circumstances, there is not now nor will there ever be created a civil penalty case in which to litigate Rivco's objections to these citations.

Roy J. Maurer
Administrative Law Judge

Distribution:

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1/ 8 FMSHRC 1269 (1986).
2/ 8 FMSHRC 1867 (1986).

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 12, 1988

NICKIE D. ORTEGA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 88-52-D
v.	:	DENV CD 87-6
ROBERT TRUJILLO, (KAISER COAL COMPANY), Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On June 23, 1988, the Commission received a letter from the complainant stating that he no longer wishes to proceed with the above-captioned case.

Accordingly, this case is hereby DISMISSED.

James A. Broderick
Acting Chief Administrative Law Judge

Distribution:

Mr. Nickie D. Ortega, 1401 Arnold, Raton, NM 87740 (Certified Mail)

Mr. Robert Trujillo, Prep Plant Foreman/Dayshift, Kaiser Coal Corp. of York Canyon, P. O. Box 1107, Raton, NM 87740 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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COLONNADE CENTER
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DENVER CO 80204

JUL 13 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 88-6-M A.C. No. 05-00571-05501 R83
v.	:	London Mine
J.S. REDPATH CORPORATION, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Patrick J. Dougherty, Senior Mining Engineer, J.S. Redpath Corporation, Mesa, Arizona, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, J.S. Redpath Corporation, with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held in Phoenix, Arizona on May 17, 1988.

The parties waived their right to file post-trial briefs and submitted the case on oral argument.

Jurisdiction

J.S. Redpath Corporation is a subcontractor providing a service for a mine owner. In turn, the mine owner produces a mineral product (Tr 24-26).

The foregoing facts establish jurisdiction.

Summary of the Case

Citation 2639288 charges respondent with violating 30 C.F.R. § 57.15004, which provides as follows:

§ 57.15004 Eye Protection

> All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The alleged violative condition, as modified, was described as follows:

> (2) Employees was not wearing safety glasses prior to commencing rock bolting underground. A eye injury could exist without protecting the employee's eyes with suitable protective devices.
> (Exhibit P3)

Summary of the Evidence

On June 23, 1987 federal mine inspector Ronald Simpson inspected a mine facility operated by Cobb Resources Corporation (Tr. 6-8). Employees of J.S. Redpath were doing development work in driving drifts and raises (Tr. 8). When the inspector came on the working area the man had just stopped drilling. The inspector was the last one to reach the end of the drift. Upon checking, he asked if they were using eye protection. They replied it was foggy and hard to see. At least one of the miners had safety glasses but he wasn't wearing them (Tr. 10, 11, 18 and 21). The driller didn't have any glasses on his person. The inspector left the area when the helper gave him his glasses (Tr. 11).

Failure to provide eye protection can cause permanent eye damage including loss of sight (Tr. 12, 14). The inspector presented evidence for eye injuries incurred on a nationwide basis since 1981 (Tr. 15-17, Ex. P1).

The workers did not acknowledge that they had drilled without glasses. The miner actually doing the drilling stated he had taken the glasses off because of the foggy conditions (Tr. 22, 23). The foggy conditions could have been definitely helped with use of the ventilation bag (Tr. 23).

When he talked to the driller, the driller's helper pulled a pair of glasses out of his pocket and gave them to the driller.

Harold Roy Walker, a retired superintendent, testified for Redpath. He indicated that as the inspection party approached miners Sullivan and Herrera, the men took their glasses off. Sullivan put his glasses inside his hard hat. Herrera put his in his pocket (Tr. 27, 28). The inspector came in, quizzed the men about the glasses, and the two miners exchanged their glasses (Tr. 28). The inspector did not observe the two miners in the act of drilling (Tr. 29-30).

Mr. Walker, who has a hearing impairment, observed Herrera and Sullivan switch glasses (Tr. 36-39).

Patrick John Dougherty, a senior mining engineer for Redpath, testified that the company stresses a nonadversarial relationship with regulatory agencies. Arguments with inspectors are avoided (Tr. 45).

Witness Dougherty was not present on the day of the inspection (Tr. 47).

Discussion and Evaluation

A credibility issue is presented here as to whether the miners were wearing safety glasses. On this issue I credit the testimony of Redpath's witness Walker. He was the first to arrive at the point where the drilling was taking place. The inspector agrees he arrived after the drilling had stopped. The foggy conditions in the draft merely confirmed why the miners removed their glasses when they finished drilling.

In addition, the violative practice described by the inspector in his citation does not constitute a violation of § 57.15004. The violative condition is that the employees were not wearing safety glasses prior to commencing rock bolting. The regulation requires eye protection where a hazard exists, not prior thereto.

ORDER

Based on the foregoing findings of fact and conclusions of law I hereby enter the following order:

Citation No. 2639288 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 13 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF MICHAEL L. PRICE AND JOE JOHN VACHA, Complainants	:	DISCRIMINATION PROCEEDING Docket No. SE 87-128-D No. 4 Mine
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	

DECISION

Appearances: Frederick W. Moncrief, Esq., and Thomas A. Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor and Complainants; Robert K. Spotswood, Esq., and John W. Hargrove, Esq., Bradley, Arant, Rose & White, Birmingham, Alabama, for Respondent; Robert H. Stropp, Esq., and Patrick Nakamura, Esq., Stropp & Nakamura, Birmingham, Alabama, for Intervenor, and Complainants.

Before: Judge Broderick

STATEMENT OF THE CASE

On May 14, 1987, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent Jim Walter Resources, Inc. (JWR) to temporarily reinstate applicants Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987. At the request of JWR, I held a hearing on the application on June 29, 1987, following which I ordered JWR to reinstate Price and Vacha to the positions from which they were discharged and to pay back wages and other benefits retroactive to June 8, 1987. The order was based on my determination that the complaints of Price and Vacha to the Secretary were not frivolously brought. My order was affirmed by

the Commission, Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (1987), and is presently on appeal to the United States Court of Appeals for the Eleventh Circuit.

The Secretary filed a Complaint of discrimination on behalf of Price and Vacha with the Commission on September 2, 1987. JWR filed its Answer on September 25, 1987. There has been substantial pretrial discovery, including depositions and interrogatories by all parties. The United Mine Workers of America (UMWA) intervened in the proceeding and took part in the discovery and the hearing, as it did in the hearing on the application for temporary reinstatement. Pursuant to notice, the case was heard on the merits on March 21 through March 24, 1988, in Birmingham, Alabama. The Secretary called Richard Brooks as an adverse witness and William Leow, Donald Pennington, Dan Green, William Glover, Kenneth Smith, Robert Galasso, Jerry Whitley, Earl Odum, Danny Joe Nelson, Barry Wood, Dwight Cagle, Herbert Jefferson, John Parrot, Jerry Grogan, Jeff Wilkes, John McVernon, Allen Robbins, Steve Anderson, and Pearlie Sue Gray as its witnesses. JWR called Christopher Frings, Michael Hall, Robert Hendricks, William Beemer, Dr. G.M. Shehi, Richard Brooks and Michael Johnson. Brooks Rouse was called as a witness by UMWA. The transcript of the Temporary Reinstatement hearing and the exhibits introduced at that hearing were admitted in this proceeding as Joint Exhibits. The transcript includes the testimony of Joe John Vacha, Michael L. Price, Thomas F. Wilson, Richard Brooks, Rayford Kelly, William Carr, Richard Donnelly and Wyatt Andrews. The exhibits include the opinion of arbitrator Samuel J. Nicholas dated January 29, 1987, on the class action grievance filed by UMWA concerning the drug testing program. They also include the transcript of the hearing before arbitrator Nicholas, March 18, 1987, on the grievance of Price and Vacha, as well as arbitrator Nicholas' opinion of April 13, 1987. All parties have filed post hearing briefs. The parties have agreed that should I find a violation of section 105(c) of the Federal Mine Safety and Health Act (the Act), they will attempt to agree on the appropriate monetary remedies. I have considered the entire record and the contentions of the parties, on the bases of which I make the following decision.

FINDINGS OF FACT

JWR MINING DIVISION

JWR operates five underground coal mines, a training facility and a central shop, all located in the State of Alabama. It employs over 2800 people, including 2200 hourly rated workers. The hourly employees are members of the UMWA; each mine has a local union, and all are affiliated with District 20 UMWA. The

UMWA and JWR are signatories to a collective bargaining agreement (in effect through January 31, 1988), which governs labor relations in the JWR mines. It covers, among other things, the establishment and the rights and duties of a Mine Health and Safety Committee at each mine. It provides for discipline and discharge of employees for just cause.

JWR'S SUBSTANCE ABUSE AND REHABILITATION & CONTROL PROGRAM

JWR perceived that it had a substance and alcohol abuse problem among its employees because a number of hourly and salaried employees had been discharged or had resigned in lieu of discharge because of alcohol or drug abuse. In addition JWR had what it considered a relatively high accident rate and a high rate of absenteeism, both of which it attributed in part to a drug and alcohol problem among its employees. It further believed that it had high and escalating health care and workers' compensation costs, which it believed were related in part to substance and alcohol abuse.

In April 1986, Mike Gossett, President, District 20, UMWA, contacted Richard Brooks, Vice President of Industrial Relations, JWR, requesting a meeting to discuss the problem of employee drug use in the JWR mines. A meeting was held in which Brooks and Eddie Roberson, JWR Labor Relations Manager, represented JWR, and Gossett and Gene Hyche, UMWA District Representative, represented UMWA. All the participants agreed that a problem of drug and alcohol abuse existed at JWR mines. They also agreed that a joint union-management program would be preferable to a company imposed work rule. Brooks proposed that the program include employee testing, education and rehabilitation and that it include families of employees. He also emphasized the importance of it being confidential. Brooks prepared a draft of a proposed program and gave a copy to the union representatives in late July 1986. Some time later Brooks talked to Tommy Buchanan, International Executive Board Member for District 20 of the UMWA. Buchanan told him he had sent his copy of the program "to Washington." Later Buchanan told Brooks that the UMWA and MSHA were working on a joint program in Washington. Brooks concluded that the UMWA was not interested in agreeing on a substance abuse program at JWR. He thereupon modified the draft of the program and prepared it as a company work rule.

At a companywide communications meeting on September 24, 1986, attended by UMWA District representatives and all the local union presidents, copies of the JWR substance abuse program were distributed. None of the union representatives indicated any problem with the program. On October 16 and 17, 1986, JWR called a series of communications meetings at each mining location during which the program was explained, and the union

representatives were advised that it would take effect January 1, 1987. In late October or early November 1986, a notice with a copy of the plan was posted at each mine location, and each employee received a copy of the plan with his or her paycheck. In early January 1987, a special issue of the JWR magazine, "Workings" was entirely devoted to the drug abuse program.

The Program is entitled Substance Abuse Rehabilitation and Control Program. It covers five typewritten pages and is divided into four main topics: Employee Testing, Disciplinary Action, Rehabilitation, and Education. It applies to all hourly and salaried employees of JWR's mining division. The testing provision is directed first to employees demonstrating a reasonable cause for testing, including (a) anyone involved in two or more mine accidents within a 12 month period, or involved in one accident which injures another employee or causes property damage; (b) an "irregular worker"; (c) an employee who comes under an attendance control policy; (d) an employee on company property who appears to be under the influence of drugs or alcohol; (e) an employee who is indicted, arrested or convicted under state or federal drug laws. Any employee who enters rehabilitation and fails to cooperate, or tests positive during the rehabilitation program shall be removed from rehabilitation, and will be subject to random testing for one year. An employee may voluntarily come under the program. Laid off employees shall be tested as a part of the recall physical examination. Section II.E. of the program provides as follows:

> Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

Brooks intended that the phrase "employee[s] whose duties . . . by job title . . . involve safety" encompassed safety inspectors, dust and noise control supervisors, and section foremen. These are all salaried positions. The only hourly employees covered are union safety committeemen who come under the phrase "employee[s] whose duties . . . by reason of elected office . . . involve safety."

The UMWA protested the unilateral implementation of the drug abuse program. It filed a class action grievance under the contract, and an unfair labor practice charge with the National Labor Relations Board (NLRB). Initially, the NLRB deferred to the arbitrator appointed under the collective bargaining contract. The arbitrator issued a decision on January 29, 1987, based on a

settlement reached by the parties: the program was recognized by the Union, but the Union disagreed with it; the Union reserved the right to file grievances on behalf of employees made subject to the program. Thereafter, however, the UMWA filed suit to set aside the January 29 award and subsequent individual awards (including an award denying the grievances of Price and Vacha) involving the program. The District Court granted summary judgment in favor of JWR, and the case is presently pending before the Court of Appeals. Apparently, the General Counsel of the NLRB has reconsidered her deferral to the arbitrator, and has instituted or contemplates instituting an unfair labor practice proceeding involving the substance abuse program.

IMPLEMENTATION OF THE PROGRAM

In late February 1987, Richard Brooks decided to randomly test the safety-related employees in all the JWR Mines under paragraph II.E. of the Program on March 2, 1987. He notified the industrial relations supervisors of the decision and "[swore] them to secrecy." The industrial relations supervisors were directed to test all employees covered by paragraph II.E. on that date. For various reasons, however, the urine samples were taken from the affected employees on March 2, 3, 6 and 9, and on April 8. Prior to March 2, there was considerable discussion and joking about the program among union employees and management officials. In the subject mine, much of the joking was directed at Price. In November 1986, Price told Wyatt Andrews, the mine safety inspector and Bob Hendricks, associate safety inspector that he had difficulty urinating in front of others. Hendricks laughed and made a vulgar remark to Price. In late November or early December a urine specimen bottle was exhibited on Wyatt Andrews' desk with a label on it reading "Mike Price UMWA." Andrews laugned when Price saw the bottle. It remained in the safety office for at least two days before Rayford Kelly directed that it be removed. Andrews and another safety inspector had on two other occasions jokingly thrust an empty CSE cannister and an empty coca cola can toward Price and Vacha telling them that they were practice piss cups. Later a styrofoam cup with Price's name and the notation "practice cup" written on it was displayed in the safety office. All these incidents took place prior to March March 2, 1987.

Price and Vacha worked on the day shift--7:00 a.m. to 3:00 p.m. At about 8:00 a.m. on March 2, Price was told that he would have to submit a urine sample. Vacha was informed at about 11:30 a.m. At the end of their shift, they went to the office of the Industrial Relations Supervisor of the No. 4 Mine, Rayford Kelly. Urine samples were taken at the No. 4 Mine from four management safety personnel and the owl shift safety committeeman. The

samples were taken under the supervision of Andrews and Hendricks, rather than Kelly. In the other mines, the samples were taken under the direct supervision of the industrial relations supervisors.

Price and Vacha signed the release form and submitted union prepared protest forms in Kelly's office. They asked whether they would be paid for the time spent in the office and were informed that they would not. Along with the other safety committeemen, they filed grievances for this, and were ultimately paid for one hour. Vacha then went to the bathroom with Andrews. He told Andrews that he was unable to urinate. He was taking a physician prescribed medication, lomotil, for a nervous stomach related to personal problems. One possible adverse reaction to this medication is urinary retention. Vacha tried on a number of subsequent occasions but was unable to provide a urinary specimen. He was clearly nervous and upset. Price also was unable to urinate. He offered to go into the bathroom naked if he could go alone, but this offer was refused. He tried a number of times to provide the sample but was unable to do so. Water, coffee and soft drinks were made available, but the requested urine samples were not forthcoming. At about 7:00 p.m. (4 hours after completion of their shift), Kelly told Price and Vacha that they would be given 30 minutes to provide a sample or be disciplined. Vacha replied that "you [or they] can't make me piss." Price asked whether they could return the next morning to give the samples, but this was refused. At approximately 7:20 p.m., they were given 5 minutes to produce a specimen or be discharged. At 7:30 p.m., they were each given formal five day suspensions with intent to discharge because of insubordinate conduct. The following morning, March 3, 1987, Price and Vacha had drug screen tests at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively. The results, which were negative, were submitted to JWR.

Many union members were upset over the drug testing program, and a meeting took place prior to March 2, involving local union presidents, District 20 officials and safety committeemen from the No. 5 Mine. At this meeting it was decided that if urine specimens were requested, the committeemen should ask why, notify management that the specimens were given under protest, and provide the specimens if they could. There is no evidence that Price and Vacha were at this meeting. However, it is clear that they and most of the other safety committeemen objected to the implementation of the program, and believed that it was discriminatory. They were also aware that if they failed to furnish a specimen, they could be discharged.

Price and Vacha filed grievances over their discharge, and the grievances were taken to arbitration under the collective

bargaining contract. The arbitrator, Samuel J. Nicholas held a hearing on March 18, 1987. JWR called Rayford Kelly and Richard Brooks as witnesses. The Union called William Brooks, Dwight Cagle, Joseph O'Quinn, Dennis Gilbert, Edward Smith, Joseph Vacha, Michael Price and Dr. Daniel Doleys. On March 19, 1987, the arbitrator announced his decision denying the grievances on the ground that the company had justifiable cause under the contract for the discharges. He issued a written opinion on April 13, 1987. In his opinion he concluded that Price and Vacha could have given urine samples but "chose not to comply with management's request." He further concluded that there was no evidence of disparate treatment or discrimination against Price and Vacha. He relied on the fact that 43 other similarly situated employees "openly complied with management's request."

At the other JWR mines, some of the safety committeemen tested were allowed to produce urine specimens without an observer being present; in other cases, the observer was immediately outside the bathroom; some produced the specimen inside a closed toilet stall. In one mine, a committeeman who was unable to produce a specimen when requested was permitted to return at the end of his shift to do so. In another instance a miner being tested for cause (he had an accident), was permitted to return thefollowing day to give a urine sample. However, although the company had already notified the miner that it intended to discharge him, he was reinstated the next day and apparently was never actually tested.

SAFETY COMMITTEES

Article II, Section (d) of the Contract provides that each mine shall have a Mine Health and Safety Committee made up of miners "who are qualified by mining experience and training and selected by the local union." The committee is given the right to inspect any portion of the mine and report any dangerous conditions to management. If the committee believes that an imminent danger exists and recommends that the employer remove all employees from the involved area, the employer must comply with the recommendation.

Under the Act, the safety committeemen are considered representatives of the miners. They may request MSHA inspections under section 103(g), and normally accompany the MSHA inspector during his physical inspections of the mine.

At the JWR mines, the safety committeemen are elected. Committeemen choose their chairman, and select alternate safety committee members.

Price and Vacha and their safety committee had the reputation of being safety activists. In six years on the committee, Vacha has filed from 75 to 100 Section 103(g) complaints, and has participated in 50 to 75 safety grievances. Price has annually filed approximately 25 Section 103(g) complaints and handled approximately 70 safety grievances. Vacha estimated that he spent approximately 50 percent of his working time on safety committee duties; he was classified as a miner operator, but actually worked on self-contained rescuers, under Wyatt Andrews of the safety department. Price also devoted about 50 percent of his time to safety committee work. He was classified as a long wall helper. On one occasion while working on the mining section, Vacha was removed from his continuous miner operator job because he was thought to be shutting down his machine because of face methane. On another occasion in June 1986, Price was told by JWR's vice-president of operations, Buck Piper, that if he wanted to keep his job he "had better back off on safety." Price was discharged in June or July 1986 "for performing [his] job as a safety committeeman," but was reinstated after arbitration. He was reprimanded in 1983 and in 1986, also while performing his duties as a safety committeeman. JWR has blamed the safety committee for causing the mine to be closed on different occasions, and for filing a large number of 103(g) complaints and safety grievances. After the discharge of Price and Vacha on March 2, and a layoff affecting owl shift committeeman Ed Smith, there were as of June 29, 1987, no elected safety committeemen at the JWR No. 4 Mine.

INDUSTRY DRUG ABUSE PROGRAMS

On September 15, 1986, the President of the United States issued an Executive Order, entitled Drug-Free Federal Workplace, in which he stated that "[D]rug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year." The Senate Commerce Committee in Senate Report 100-43, 100th Cong. 1st Sess., to accompany S. 1041 filed April 10, 1987, found that "Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism." A recent issue of the Duquesne Law Review has an exhaustive comment on compulsory drug screening in employment. 25 Duquesne Law Rev. 597 (1987). The problem is apparent; a solution which recognizes the union's interest and the rights to privacy and personal dignity of the employees is more difficult.

JWR and the UMWA officials involved with the JWR mines agreed that a significant problem of substance abuse existed among the employees in the JWR mines. They agreed that the problem should be addressed by a joint Company-Union program. They agreed that the program should include education, testing and rehabilitation. The UMWA believed that the program should be subject to collective bargaining. JWR, however, after some cursory discussions with different union officials, concluded that the UMWA was not interested in a joint program, and it unilaterally promulgated the plan involved in this proceeding. Prior to that time, the UMWA had not objected to, nor had it agreed to the provision which became Section II.E. in the program. Section II.E. (and much of the rest of the program) was drafted by Richard Brooks. Brooks' experience with safety committeemen was essentially limited to arbitration proceedings. He had little direct contact with the safety committees in the performance of their regular duties. There is no evidence that Section II.E. or any other part of the plan was motivated in any part by hostility to safety committee members. I accept Mr. Brook's testimony that he included safety committee members in Section II.E. because he believed that they had such a high degree of responsibility for safety in the mines.

Compulsory collection of urine for drug testing is "a highly invasive experience" (R571). This fact was recognized by the 5th Circuit Court of Appeals in the case of National Treasury Employees Union v. VonRaab, 816 F.2d 170, 175 (5th Cir. 1987):

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom.

Collection of urine under the observation of co-workers or supervisors is especially uncomfortable for most people. The employees at JWR believed that compulsory drug testing was in some way accusatory, that being singled out for testing without cause was an invasion of privacy and degrading. One employee who was tested because she reported two back injuries within a year "felt humiliated and embarrassed about" being required to give a urine specimen. (R627) Recent news media stories have also created the fear in the minds of many JWR employees that the results of testing are not completely accurate, thus raising the specter that they might be falsely and unfairly branded as drug users. The evidence shows however that the drug screen testing used by JWR--an initial screen and a confirmatory screen--is better than 99 percent accurate. This, of course, presumes that

the collection procedures including chain of custody are strictly followed.

A substantial number of JWR employees, including most members of the safety committees, believe that singling out safety committee members for random testing is unfair. Some safety committee members have resigned because of the program. A number of others have considered resigning. Miners have refused to run for safety committee positions because they would be singled out for random testing four times per year. Steve Anderson who resigned from the safety committee testified:

> [The drug abuse program] is just too much room for harassment. You try to do your job and if you write a 103g or you file a complaint or the Federal, something like that if they don't like it, they got too much room for harassment just of the safety committee, that four times a year. (R.618)

The bashful bladder syndrome is a psychiatric illness--a social phobia--in which a person has a fear of urinating in public restrooms or in any place where the person is, or fears he/she is, in public view. Approximately one person in three hundred of the general population has this condition. However, stress, fear or anger can affect a person's ability to provide a urine specimen, even though he/she is not suffering from a clinical case of bashful bladder syndrome. From one to three percent of the population may experience individual episodes in which he or she has great difficulty in urinating because of some anxiety or pressure type situation.

I have considered the testimony before me of Dr. George Michael Shehi, and the record of the testimony of Dr. Daniel M. Doleys before the arbitrator. I have also considered the testimony of Price and Vacha. I find as facts that neither Price nor Vacha had a clinical case of bashful bladder syndrome. I further find that both Price and Vacha were anxious, fearful and angry over the requirement that they submit urine samples on March 2, 1987. I have very carefully and respectfully considered the opinion of arbitrator Nicholas that Price and Vacha "chose not to comply with Management's request" and that they "refused" to deliver urine samples. However, I have an independent responsibility under the Mine Safety Act, and have heard the testimony of Price and Vacha among other witnesses. I have observed their demeanor on the witness stand, and have weighed their obvious interest in the outcome of this proceeding. I am persuaded that they fully understood the nature of the oath they took to tell the truth. I disagree with the implied conclusion of the arbitrator that they perjured themselves. I find, as I previously found in my Temporary Reinstatement Order, that Price

and Vacha had physical or psychological difficulties in providing the required samples on March 2, 1987. I find that they did not refuse to submit the urine samples, but were unable to do so under the circumstances present on the evening of March 2 at the subject mine.

ISSUES

1. Is the JWR Substance Abuse Program on its face violative of section 105(c) of the Mine Act, irrespective of the motivation of JWR?

2. Was the JWR Substance Abuse Program as applied to claimants Price and Vacha in violation of their rights under section 105(c)?

3. What deference is owed to the findings and conclusions of the Arbitrator who upheld the discharges of Price and Vacha?

CONCLUSIONS OF LAW

JURISDICTION

JWR is subject to the provisions of the Mine Act in the operation of the subject underground coal mine. Michael Price and Joe John Vacha were, as of March 2, 1987, miners and representatives of miners as those terms are used in the Act.

FACIAL VALIDITY OF THE JWR SUBSTANCE ABUSE PROGRAM

The typical case of discrimination under section 105(c) of the Act involves adverse action taken against a miner for activity related to safety and therefore protected under the Act. In such a case, the motivation of the employer or other person respondent is important. In this case, the Secretary contends that the drug testing program (or section II.E. thereof) is per se discriminatory and therefore violative of the Act. The employer's motivation is, if not irrelevant, at least not so important. It is clear that a policy or program of a mine operator can itself be held to violate the Act. Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979). Enforcement of such a program by adverse action against a miner or miner's representative, it seems clear to me, can be prohibited regardless of the mine operator's motive.

Insofar as it requires random unannounced urine testing, JWR's substance abuse program applies only to elected safety committee members, among all hourly employees. The evidence establishes that the activities of many other hourly employees, including those who work at the coal face, and on-shift and

pre-shift examiners ("firebosses") are intimately related to safety, but they were not included in the random testing requirement. JWR's explanation for the distinction is that safety committee members have the greatest responsibility for safety of anyone in the mine. Brooks stated that it was for that reason that these employees were to be tested first. Brooks and William Carr, President of JWR's Mining Division, implied that they intended to test other hourly workers in the future. However that may be, it is clear that the current program is restricted to, and immediately impinges on one small group of hourly employees: the elected members of the mine safety committees.

The evidence establishes that the miners at JWR view mandatory drug testing with varying degrees of hostility: many consider it to be accusatory and believe that it casts suspicion of drug use on persons being tested. They look upon the testing procedures followed by JWR as an invasion of privacy and an affront to their dignity. Further, some of the miners have been exposed to news media reports which cast doubt on the accuracy of the testing procedures. Thus, they expressed fear that they might be erroneously branded as drug users. These suspicions and doubts seem to me to have resulted in part at least from an inadequate education effort on the part of JWR, and from the fact that the program was instituted unilaterally, without the participation of the unions.

The members and potential members of the mine safety committee reacted negatively and hostilely to the provisions of II.E. which they viewed as unfairly singling them out for random testing four times annually. As a result of this reaction, some committee members have resigned; others have considered resigning (only one test has been conducted to date because of the pending litigation), and further testing may cause further resignations. Still others have refused to accept safety committee positions or to run for election to them.

Based on this review of the evidence, I conclude that one effect of the drug abuse program has been to severely limit the independence and therefore the effectiveness of the committees. This is true without regard to the motivation of JWR in instituting the plan. The importance of preserving the independence of safety committee personnel was underscored in the case of Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, supra, a case under the 1969 Coal Act. The safety committeeman is the representative of the miners under the Act. He or she is the usual conduit for miners' safety complaints to management or to MSHA. Although miners and mine management are both clearly interested in safety, a safety committeeman brings a different perspective, a different attitude to safety matters,

the perspective and attitude of the miner. He may be less concerned about production and more concerned about the lives and limbs of the workers. In some instances at least, his concerns and opinions may clash with those of management. It is therefore important that his independence be maintained. Congress strengthened the antiretaliatory provisions in the Coal Act when it enacted the 1977 Mine Act. The legislative history of the Mine Act makes this clear:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. . . .
>
> * * * * *
>
> The wording of section [105(c)] is broader than the counterpart language of section 110 of the Coal Act and the Committee intends section [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.

S. Rep. 95-181, 95th Cong., 1st Sess. 35-36 (1977), contained in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. (1978) 623-624.

I have previously found that the program was not intended to diminish the rights and responsibilities of the miners' representatives, but its effect has clearly been to do so. I conclude that a retaliatory motive need not be shown to make out a claim of discrimination under the Mine Act in the circumstances of this case. Cf. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). Therefore, I conclude that section II.E. of the JWR Drug Abuse and Rehabilitation and Control Program is facially in violation of section 105(c) of the Act. The discharge of Price and Vacha on the ground that they refused to participate in the program was therefore also in violation of section 105(c).

IMPLEMENTATION OF THE PLAN-DISCHARGE OF PRICE AND VACHA

The Secretary and the Intervenor both contend that even if the drug testing plan is not discriminatory on its face, it was discriminatorily applied to Price and Vacha because of their safety committee activities. Specifically, they argue that Price and Vacha were harassed and were subjected to disparate treatment

because they were safety activists. Finally, they contend that they were discharged because of their activity as safety committeemen. To establish a prima facie case of discrimination under this theory of the case, complainants have the burden of establishing that they engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 817 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. The operator may also defend affirmatively by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra.

The safety committee activities of Price and Vacha were clearly protected by the Act. Safety inspections, safety complaints to mine management and MSHA, relaying miner complaints to mine management and MSHA: these are prototypically activities protected under the Mine Act. Refusal (as JWR claims) or failure because of inability (as Price and Vacha claim) to produce urine specimens for drug tests would not on the surface seem to be protected. But the specimens were sought only because Price and Vacha were safety committeemen and therefore representatives of the miners. Complainants contend that the pre-testing harassment and the refusal to accommodate the difficulties complainants experienced in providing the specimens are evidence of a discriminatory motive.

Rayford Kelly, the Industrial Relations supervisor at the No. 4 Mine, who discharged Price and Vacha, was not directly involved with the safety committee activities of Price and Vacha but was clearly aware of them. He knew they were safety activists, that they were "notorious" for filing safety complaints. The supervision of the urine collection at the No. 4 Mine was delegated to Andrews and Hendricks, company safety inspectors, rather than remaining in the Industrial Relations Department, as in the other mines. In some of the mines, those supervising the collection did not go into the bathroom with those giving the samples. No accommodation was offered Price and Vacha when they claimed inability to produce urine specimens, though some accommodation was given others involved in the drug screening program. I have found as a fact that Price and Vacha did not refuse to give specimens, but were in fact physically or psychologically unable to produce the specimens prior to being discharged on March 2, 1987. On the basis of this evidence, and reasonable inferences from the evidence, I conclude that the

discharge of Price and Vacha was motivated in part because of protected activity, i.e., because of their activities as safety committeemen. The evidence also establishes that JWR made known that refusal or failure to submit urine samples when required under the program would be ground for discharge. This was based on its conclusion that such refusal would be violative of a work order and thus insubordination. It is not my function to determine whether such a policy was a good one or was in compliance with the contract. (It involved a "work order" which involved activity "off the clock"). Price and Vacha were discharged for insubordination--violating a work order. Would they have been discharged "in any event" for such insubordination--that is, if they were not notorious for filing safety complaints? Since none of the other employees tested in March and April 1987 failed to produce urine specimens, answering this question is not easy. JWR told those being tested that failure to give a urine specimen would result in discharge. I believe that any safety committeeman who failed to produce a specimen when asked would have been discharged. Therefore, I believe that Price and Vacha would have been discharged for failure to produce the specimens if they were not safety watchdogs but harmless safety pussycats. I conclude therefore that JWR would have discharged Price and Vacha for violating a work order (not protected activity) in any event, and that the drug testing program was not discriminatorily applied to Price and Vacha. This conclusion does not affect my previous conclusion that the program was discriminatory on its face.

DEFERENCE TO ARBITRATOR

In a "Summary Opinion" dated April 13, 1987, Arbitrator Samuel J. Nicholas, Jr., restated his award of March 19, 1987, denying the grievances filed by the UMWA on behalf of Price and Vacha. The arbitrator determined that JWR had the right to direct Price and Vacha to deliver urine specimens and that Price and Vacha had the duty to provide them. He held that the discharge of Price and Vacha was not "colored by discrimination and/or disparate treatment," that the discipline meted out was appropriate "given the . . . circumstances surrounding the[employees] refusal to deliver the . . . urine samples." The transcript of the arbitration proceeding and the arbitrator's opinion were before me when I issued my Temporary Reinstatement order. I held that arbitrator's findings are not binding on the Commission, citing Pasula v. Consolidation Coal Co., supra. It is beyond argument that the Commission may not abdicate its responsibility to decide whether a miner was discriminated against under section 105(c) of the Act, because an arbitrator has decided that the miner was or was not discharged for just cause under the collective bargaining agreement. JWR argues, however, that I should defer to the arbitrator's conclusion that

Price and Vacha refused to provide the requested urine specimens. I have considered this conclusion and have reviewed the testimony on which it was based. I have also considered the testimony before me and have elsewhere in this opinion given my reasons for disagreeing with the arbitrator. I believe I have given his findings great weight. But they are not compelling. Further, my disagreement with the arbitrator's finding is of little importance since, despite my finding that Price and Vacha did not refuse to provide urine specimens, I concluded that they did not establish (assuming the facial validity of the program) that they were discharged in violation of section 105(c). The arbitrator's findings and conclusions are not entitled to deference or to great weight in determining the legal issue whether Section II.E. of the drug testing program was on its face violative of Section 105(c).

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Respondent JWR shall permanently reinstate Michael L. Price and Joe John Vacha to the positions from which they were discharged on March 2, 1987.

2. Respondent shall pay wages and other benefits to Price and Vacha from March 3, 1987, until the date of their reinstatement with interest thereon in accordance with the Commission decision in Secretary/Bailey v. Arkansas Carbona Co., 5 FMSHRC 2024 (1984).

3. The attorneys for the intervenor contributed substantially to the successful litigation of the claim. However, under the rule enunciated in Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639 (4th Cir. 1987), and Maggard v. Chaney Creek Coal Co., 9 FMSHRC 1314 (1987), complainants are not entitled to reimbursement for private attorney's fees.

4. Respondent shall expunge from its personnel records, all references to the discharges of Price and Vacha on March 2, 1987.

5. Respondent shall cease and desist from enforcing the provisions of paragraph IIE of its Substance Abuse Rehabilitation and Control Program against safety committee personnel in all its mines.

6. Counsel for the parties shall confer and attempt to agree upon the amounts due Complainants under No. 2 above. They shall report to me the results of their attempt on or before

August 12, 1988. This decision shall not be final until a supplemental decision and order has been issued concerning the amounts due under No. 2 above.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 15 1988

TERRY MILLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 88-184-D
	:	PITT CD 88-06
BENJAMIN COAL COMPANY,	:	
Respondent	:	Benjamin No. 1 Strip

ORDER OF DISMISSAL

Before: Judge Melick

Complainant requests approval to withdraw his Complaint in the captioned case for the reason that the underlying issue has been settled. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed and the hearings previously scheduled for August 10, 1988, are cancelled.

Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 15 1988

JOSEPH M. MAZENKO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 88-192-D
BENJAMIN COAL COMPANY, Respondent	:	PITT CD 87-18

ORDER OF DISMISSAL

Before: Judge Melick

Complainant has filed notice that the parties have reached an agreed settlement of the underlying issue. I consider the notice as a request to withdraw the Complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed and the hearings previously scheduled for July 26, 1988, are cancelled.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

JUL 18 1988

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 88-21
	:	A. C. No. 36-07571-03515
v.	:	
	:	JPLMJ Strip Mine
WESTRICK COAL COMPANY, Respondent	:	

ORDER OF DEFAULT

On June 30, 1988, in response to Petitioner's Motion to Dismiss Respondent's Notice of Contest, a Show Cause Order was issued which ordered Respondent as follows: "Failure of Respondent by July 11, 1988, to respond to the Prehearing Order or show cause why it has not responded to the Prehearing Order shall result in the Dismissal of Respondent's Notice of Contest, and a default judgment will be entered in favor of the Solicitor ordering the Respondent to pay the assessed penalties of $482.00.

To date, Respondent has not responded to the Show Cause Order. Accordingly, it is found that the Respondent is in default, and it is ORDERED that a default judgment be entered in favor of Petitioner. It is further ORDERED that Respondent, within 30 days of this Order, pay the assessed penalty of $482. It is further ORDERED that the Hearing in this matter, set for July 26, 1988, be canceled.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

JUL 18 1988

JAMES BOWLING, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 88-39-D
WOODS CREEK COAL CORPORATION, Respondent	:	BARB CD 88-01

ORDER OF DISMISSAL

On July 14, 1988, Respondent filed a Settlement in the above case executed by both Parties. In essence, in the Settlement, Complainant agreed, for considerations received, to "settle" all claims against Respondent. As such the above proceeding is moot, and it is thus ORDERED that this case be DISMISSED. It is further ORDERED that the Parties shall abide by the terms of the Settlement dated July 8, 1988.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 22 1988

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 88-8-R
	:	Order No. 2947173; 9/9/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 88-112
	:	A.C. No. 46-01436-03713
v.	:	
	:	Shoemaker Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: B. Anne Gwynn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company (Consol).

Before: Judge Broderick

STATEMENT OF THE CASE

This proceeding involves the contest by Consol of a withdrawal order issued under section 104(d)(2) of the Federal Mine Safety and Health (Act), and a petition for a penalty by the Secretary for the safety violation alleged in the withdrawal order. Pursuant to notice the consolidated cases were heard in Wheeling, West Virginia, on June 23 and 24, 1988. Federal Mine Inspector Lyle Tipton and Robert Polanski testified on behalf of the Secretary. Lloyd Behrens, Dave Hudson and Michael Blevins testified on behalf of Consol. Counsel for both parties waived their rights to file post hearing briefs. I have considered the entire record on the basis of which I make the following decision.

FINDINGS OF FACT

1. Consol is the owner and operator of the subject mine located in Marshall County, West Virginia.

2. In 1986, the subject mine produced 2,334,000 tons of coal. Consol is a large operator.

3. There were 715 inspection days at the subject mine in the 24 month period prior to the issuance of the contested order. During that period 563 paid violations were assessed against the mine, of which 463 were termed significant and substantial. Eighty-six of these violations were of 30 C.F.R. § 75.200 and two were were of 30 C.F.R. § 75.202. I consider this a substantial history of prior violations.

4. There was no intervening clean inspection between August 28, 1986, when withdrawal order 2828131 was issued under section 104(d)(2) of the Act, and September 9, 1987, when order 2947173 (the order contested herein) was issued.

5. Sometime during the week of August 31, 1987, a miner, Dave Tkach told Consol Safety Inspector Lloyd Behrens that the entrance into the Brit Run Pumper Shanty had some areas of unsafe roof and should be checked. This area is parallel to and close to a part of the 5 North intake escapeway. Behrens went to the area of the pumper and "couldn't find anything." He did not inform Tkach of this.

6. The fresh air escapeway is required to be inspected by the operator at least once each week. On September 9, 1987, during the midnight shift, Consol safety inspector Tom Duffy walked the 5 North fresh air escapeway. He found 23 conditions needing corrective action, all having to do with the condition of the roof. He tagged the areas needing correction. He prepared a three page report of the conditions and noted that a total of 42 posts and one crib were required to correct the conditions. Copies of his report were given to the Assistant Superintendent, Dave Hudson and to Safety Supervisor Michael Blevins, among others. The reports were made prior to the shift change at 8:00 a.m. on September 9.

7. Dave Hudson thereafter directed the Assistant shift foreman, Jack Marvin "to continue posting in the 5 North Air Courses." Two sections were then working inby this area and dependent on the escapeway.

8. Federal Mine Inspector Tipton arrived at the mine to make a regular quarterly inspection between 8:00 and 9:00 a.m. on September 9, 1987. Robert Polanski, a member of the mine safety

committee, told Tipton that there were hazardous roof conditions in the intake air escapeway and that a pumper named Tkach had complained of them. For this reason Tipton proceeded to the 5 North intake air escapeway.

9. Inspector Tipton found 18 separate locations along approximately 2000 feet of the escapeway where the roof was unsupported or inadequately supported. In three of the locations, the roof was totally unsupported, and the inspection team had to leave the escapeway to an adjoining airway and double back to the escapeway beyond the unsupported area.

10. The unsupported roof resulted from the failure of the bolts to hold. Some of the bolts were dangling, others had fallen to the mine floor; some bearing plates were dislodged; some rock and cap coal had fallen to the mine floor. I find as facts that the conditions were essentially as found by Inspector Tipton and that there were 18 areas of unsupported or inadequately supported roof in the 5 North intake escapeway on September 9, 1987.

11. The intake air escapeway was approximately 5000 feet long. It had been roof bolted many years previously using conventional metal bolts. The area has a high velocity of air and high humidity. Both of these conditions tend to cause rapid deterioration in the mine roof and ribs. However, the roof conditions found by Inspector Tipton on September 9, 1987, were such that they could not have occurred in less than one week.

12. The conditions cited in the contested order were promptly abated after the order was issued. The work of abatement had actually commenced before the order was issued. The order was terminated at 5:22 p.m. on September 9, 1987.

ISSUES

1. Did the condition found by Inspector Tipton on September 9, 1987, constitute a significant and substantial violation?

2. Did the condition result from the unwarrantable failure of Consol to comply with the mandatory standard?

3. What is the appropriate penalty for the violation cited in the order?

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine, and I have jurisdiction over the parties and the subject matter of this proceeding.

2. The condition found to exist in the 5 North intake escapeway of the subject mine by finding of fact No. 10 constitutes a violation of 30 C.F.R. § 75.200. The roof was not supported or otherwise controlled adequately to protect persons from falls of the roof. The escapeway is an active underground travelway. Consol did not seriously contest the fact of violation.

3. For a violation to be of a significant and substantial nature, there must be a reasonable likelihood that the hazard contributed to will result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (1984). The hazard in the case before me is two fold: (1) a roof fall endangering miners travelling the escapeway; (2) the blockage or rendering impassable the designated escapeway. The condition of the roof here was such that a fall was reasonably likely to occur; in fact some falls had occurred. The escapeway was without any roof support in at least three areas. Any injury resulting from a roof fall would likely be serious. I conclude that the violation charged in the contested order was of a significant and substantial nature.

4. Unwarrantable failure was held by the Commission to mean "aggravated conduct, constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997 (1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). I conclude that the violation cited in the contested order was due to Consol's unwarrantable failure because (1) the condition was such that it must have existed for more than seven days prior to the order; therefore it existed when the examination of the area was made (or should have been made) on or about September 2, 1987; (2) Consol was put on notice of the "ratty" and unsafe condition of the roof in the area when the pumper Dave Tkach complained of it during the week of August 31, 1987; (3) Consol safety inspector Duffy during the midnight shift on September 9, found 23 areas in the escapeway needing corrective action. Yet there was no corrective action taken until after Inspector Tipton began his inspection of the escapeway after the beginning of the day shift. These facts in my judgment establish aggravated conduct, constituting more than ordinary negligence.

5. The condition cited was serious and was caused by Consol's aggravated conduct. Consol is a large operator with a significant history of prior violations at the subject mine. The

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUL 25 1988

IRVIN L. GAGON, Complainant	:	DISCRIMINATION PROCEEDING
	:	
v.	:	Docket No. WEST 88-144-D
	:	
CYPRUS-PLATEAU MINING CORPORATION, Respondent	:	DENV CD 88-4
	:	
	:	Starpoint No. 2 Mine
	:	

DECISION APPROVING SETTLEMENT

Before: Judge Lasher

The parties have reached a resolution of this matter without the necessity of litigation. Pursuant thereto, the parties through counsel have submitted a Stipulation and Settlement Agreement dated July 18, 1988, the terms of which are here approved.

Pursuant to the agreement of the parties, this proceeding is dismissed with prejudice with each party to bear his (its) own costs.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. Irvin L. Gagon, 131 South 5th East, East Price, UT 84501 (Certified Mail)

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Stan Warnick, Personnel Director, Cyprus Mining, P.O. Drawer PMC, Price, UT 84501

/bls

violation was promptly abated in good faith. There is no evidence that the imposition of a penalty will affect Consol's ability to continue in business. I conclude that an appropriate penalty for the violation is $1000.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order 2947173 issued September 9, 1987, is AFFIRMED, including its special findings that the violation charged was significant and substantial and resulted from Consol's unwarrantable failure to comply.

2. Consol's notice of contest of the order is DISMISSED.

3. Consol shall within 30 days of the date of this order pay a civil penalty of $1000 for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JUL 25 1988

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	:	Docket No. WEST 88-144-D
v.	:	
	:	DENV CD 88-4
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

JUL 28 1988

SOUTHERN OHIO COAL COMPANY Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. LAKE 87-95-R Citation No. 2945843; 7/22/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Meigs No. 2 Mine Mine ID 33-01173
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 88-26 A. C. No. 33-01173-03743
v.	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

Appearances: David A. Laing, Esq., Porter, Wright, Morris & Arthur, Columbus, Ohio, for the Operator
Patrick M. Zohn, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Operator (Respondent) seeks to challenge a citation issued to it by the Secretary (Petitioner) for an alleged violation of 30 C.F.R § 70.100, and the Secretary seeks a civil penalty for the alleged violation by the operator of section 70.100, supra. Pursuant to notice, these cases were heard in Wheeling, West Virginia, on April 19 - 20, 1988. Patrick Lester McMahon, Marion D. Beck, and Judith Irene Johnson testified for Petitioner, and David George Zatezalo, Jon Merrifield, and Mark Randall Hatten testified for Respondent.

At the hearing, at the conclusion of Petitioner's case, Respondent made a motion for summary decision, which was denied. Petitioner filed its Post Trial Brief and Proposed Findings of Fact on June 13, 1988, and Respondent filed its Proposed Findings of Fact and Brief on June 10, 1988. Reply Briefs were filed by both Parties on June 27, 1988.

Issues

The issues are whether Respondent violated 30 C.F.R. § 75.100, and if so, whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. If section 75.100, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977.

Stipulations

The Parties have stipulated as follows:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Southern Ohio Coal Company is a large operator.

3. The Meigs No. 2 Mine is owned and operated by the Southern Ohio Coal Company.

4. The Southern Ohio Coal Company is an operator as defined by section 3(d) of the Act.

5. The Meigs No. 2 Mine is a mine as defined by section 3(h) of the Act.

6. The Southern Ohio Coal Company and the Meigs No. 2. Mine are subject to the jurisdiction of this Court and the 1977 Mine Act.

7. The size of the proposed penalty, if any assessed, will not affect the operator's ability to continue in business.

Findings of Fact and Conclusions of Law

I.

The essential facts are not in dispute. Patrick Lester McMahon, a MSHA Inspector who is a health specialist, made a technical inspection at Respondent's Meigs No. 2 Mine, at the southwest block third panel. On July 15, 1987, at that time, the longwall panel was only in its third shift. Inspector McMahon testified at length as to the procedures he used in setting up the test equipment and as to the equipment itself. No evidence was adduced to either contradict McMahon's testimony as to the procedures he used in setting up the equipment, nor was any

evidence adduced which would tend to impeach either the reliability of McMahon's methods, or the reliability of the equipment he used. McMahon furnished the test equipment to be worn, for 8 hours, by miners with the following occupations: headgate operator intake, 040; jack operator intake, 041; shear operator intake (head), 064; shear operator return (tail), 044; jack setter return, 041. The shear operator return was considered to be the "designated" occupation in this group as being exposed to the most dust on the longwall operation. At the end of the shift, McMahon collected the equipment containing the dust samples and returned to the MSHA Office. McMahon testified in detail concerning the nature of the equipment used to test the dust samples, the procedures that he used in setting up the equipment, and in testing the samples. No evidence was adduced which contradicted McMahon's testimony as to the procedures he performed. Nor was any evidence adduced which would tend to impeach the reliability of either the procedures or equipment used by McMahon in testing the samples. Accordingly, I find that the dust sample results obtained by McMahon on July 15 to be reliable. These indicate the following milligrams of dust per cubic meter for the following occupations in the section:

shear operator intake	2.2
headgate operator intake	0.3
jack operator intake	1.5
jack operator return	2.5.

The sample for the designated occupation of shear operator return was voided as the sample contained oversize particles. The average for the section was 1.5 milligrams per cubic meter. McMahon decided, to return for additional testing, because the sampling for the high risk occupation was void, and because sampling for the shear operator intake and jack setter return yielded samples which exceeded the maximum set forth in section 70.100, supra, of 2.0 milligram per cubic meter.

On the following day, testing was performed by MSHA Inspector Marion D. Beck. In essence, the procedures and equipment used by Beck were the same as those used by McMahon. 1/ (Beck had inadvertently placed the wrong occupation number on the equipment.

1/ Respondent, in essence, argues, in paragraph B of its Brief, that 30 C.F.R. §§ 70.201(c), 205(b), and 207(d), containing requirements for dust sampling by Operators should be imposed on the Secretary, and that these Sections were violated by Beck. I find that I do not have any authority to essentially crate a regulatory obligation on the Secretary where none exists.

However, inasmuch as this error did not change the overall average for the section, and inasmuch as the error is corrected by reversing the dust concentrations for the shear operator return and shear operator intake, the error was found to be inconsequential.) Beck, at the conclusion of the 8 hour shift on July 16, 1987, obtained the dust samples from the miners tested, and took them to the MSHA Laboratory. Judith Irene Johnson, a MSHA Lab Technician, testified, in essence, that she tested the samples on July 16, using the same equipment procedures and methods as testified to by McMahon. She also reweighed her results the following day with no change in the results. Also, McMahon testified that on July 20 he verified the results obtained by Johnson on July 16. Accordingly, I find, that on July 16, the following occupations were tested with the following concentration of dust in milligrams per cubic centimeter:

shear operator intake	void due to oversize particles
shear operator return	7.1
headgate operator intake	1.7
jack operator intake	0.1
jack setter return	7.1.

The average for the section was 4 on July 16, and the cumulative 2 day average was 2.7.

McMahon testified that because two occupations sampled were above the limit of 2.0 milligram per cubic meter on July 16, he had to return for additional testing. McMahon further testified that pursuant to MSHA policy, which indicates that an occupation with an average dust concentration of 1.6 or less after the second day of testing may be dropped from further testing. McMahon decided not to test the headgate operator intake on the third day as the 2 day average for this occupation was only 0.9, and there was no reason to continue testing that occupation. However, according to McMahon, inasmuch as there were two occupations whose test results on July 16 exceeded the regulatory maximum of 2.0, he decided to return on July 21 for additonal testing. McMahon's testimony with regard to the procedures and equipment used in testing on July 21 was not contradicted. Accordingly, I find, that on July 21 when tested, the following occupations in the sections had the following concentration of dust per cubic meter:

shear operator intake	1.7
shear operator return	1.1
jack operator intake	0.2
jack setter return	0.2.

I further find that the average for the section based upon the cumulative results for the 3 days of testing, to be 2.1 milligrams per cubic meter.

Inspector McMahon, when presented with these results, issued a citation for a violation of section 70.100, supra, which provides, in essence, that the average concentration of respirable dust during each shift, to which each miner in the active workings of the mine is exposed, shall be at or below 2.0 milligrams per cubic meter. Inasmuch as the third panel had been in existence for two shifts prior to the inspection on July 15, and was actively engaged in the mining of coal, I conclude that the panel in question was a "active workings," as referred to in section 70.100, supra, (see also 30 C.F.R. § 70.2). Further, inasmuch as the cumulative average for the occupations tested in the section in question on July 15, 16, and 21, 1987, produced a cumulative average of dust concentration for the section of 2.1 milligrams per cubic feet, I conclude that section 70.100, supra, has been violated.

II.

It appears to be the position of Respondent that the Petitioner has the burden of establishing that the method used in sampling the dust herein was reasonable. In this connection, it is Respondent's further argument, that the omission by McMahon of the headgate operator intake from the testing on July 21, was arbitrary, and that accordingly the cumulative average of 2.1 was not arrived at reasonably. In this connection, Respondent makes reference to uncontradicted testimony that the headgate operator intake, being closest to the source of the intake air, normally has the lowest exposure to dust of the five occupations in the section which were subject to the testing. Thus, Respondent argues that it is likely that had the headgate operator intake been tested on July 21, the result would have been a dust concentration equal to or less than that of 0.2, which was the dust concentration yield for the two occupations whose result was the lowest in the section on July 21. Respondent argues that had the headgate operacor intake not been dropped from the testing on July 21, 1987, it is very likely that he would have been subject to dust concentration of equal or less than 0.2, hence bringing the 3 day cumulative average to 2.0 or less and thus being within the regulatory standard. Respondent, in essence, also argues that omitting a previously sampled occupation when computing a section average, is not rational. Further, Respondent argues that when policy which provides for the omission of those occupations with previous tested concentrations of less than or equal to 1.6 results in the section average based on greater samples from "dustier" occupations, the test results are irrationally detrimental to the operator.

I find however that there is no evidence that McMahon dropped the headgate operator intake from the testing on July 21, 1987, in order not to have the average for the section decreased. Indeed, it is to be noted that McMahon retained for testing on the July 21 the jack operator intake whose test result of 0.1 on July 16 was even less than the result of 1.7 yeilded for the headgate operator intake. Moreover, since it is manifest that the purpose of section 70.100(a), supra, is to protect miners from excessive exposure to the hazards of dust, it is not irrational, per se, to discontinue testing an occupation (040) which had evidenced exposure to dust concentration in 2 previous days of testing substantially below the regulatory ceiling. If the resulting section average will be then based on greater samples from dusty occupations, the section average will thus realistically reflect the hazards to the section.

Accordingly, I find that Petitioner herein acted reasonably in its method of testing, and that there was insignificant evidence that it acted arbitrarily. 2/

III.

McMahon testified that he considered the violation herein to be significant and substantial, inasmuch as exposure to dust concentrations of more than 2.0 milligram per cubic meter contributes to the hazard of a pulmonary disease which is a disease of reasonably serious nature. Respondent indicated at the hearing that it did not dispute the significant and substantial aspect of this case. Accordingly, I find that the violation herein was significant and substantial.

IV.

In assessing a penalty herein, I have the adopted the uncontradicted testimony of McMahon with regard to Respondent's negligence and find that Respondent acted with a low degree of negligence. I further find that the Respondent herein acted in good faith in abating the violation, and I find that, based upon the testimony of McMahon, the violation herein was of a moderately serious nature as exposure to excessive respirable dust is likely to contribute to the hazard of pulmonary disease.

2/ Respondent, in its Brief, has argued that the manner in which abatement was required was unlawful. I find this argument to be irrelevant in evaluating the validity of the citation that is at issue herein. I also note that Respondent does not seek any relief for the Petitioner's allegedly unlawful manner of abatement.

Further, I have adopted the stipulations of the Parties and the factual data on GX 14, with regard to the remaining factors in section 110(i) of the Act. Accordingly, I find that a penalty herein of $259 as proposed is appropriate.

ORDER

It is ORDERED that Respondent shall pay, within 30 days of this decision, a civil penalty of $259 for the violation found herein.

Avram Weisberger
Administrative Law Judge

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 28 1988

STANLEY BAKER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 87-142-D
KENTUCKY STONE COMPANY, Respondent	:	Pulaski Plant

DECISION

Appearances: Philip P. Durand, Esq. and Wendy Tucker, Esq., Ambrose, Wilson, Grimm & Durand, Knoxville, Tennessee, for Complainant; John G. Prather, Jr., Esq., Law Offices of John G. Prather, Jr., Somerset, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.F.C. § 815(c) (the Act) alleging, in essence, that he was illegally fired in violation of the Act.

Pursuant to notice of November 6, 1987, the case was set for hearing in Knoxville, Tennessee, on December 8 - 9, 1987. In a conference call initiated by the undersigned on November 30, 1987, between the undersigned and the attorneys for both Parties, the Complainant's attorney made a request for the hearing to be adjourned. This request was not objected to by Respondent's attorney. Accordingly, pursuant to notice, the case was rescheduled and subsequently heard in Knoxville, Tennessee, on March 15 - 16, 1988. Stanley Baker, Charlotte Dykes, Roger Hasty, Sherman McClure, Melvin Thomas, Mark Lueking, Dale Tabor, Johnny Bruner, and Donny Tabor testified for the Complainant. Dennis Halcomb, Glennis Miller, Danny Roberts, Earl Howard, and Herbert Robbins testified for the Respondent.

At the hearing, at the conclusion of the Complainant's case, Respondent make a motion for a directed opinion in favor of the Respondent, and decision was reserved on this motion.

Complainant filed its Proposed Findings of Fact and Memorandum of Law on June 1, 1988, and Respondent filed its Proposed Findings of Fact and Memorandum on June 1, 1988. On June 10, 1988, Complainant filed a Response to Respondent's Summary of Proceedings and Response to Respondent's Memorandum of Law.

Stipulations

1. Except for occasional layoffs, Complainant worked at Kentucky Stone Corporation's Pulaski Plant from September 15, 1976 until he was fired on May 2, 1985.

2. The Kentucky Stone Corporation ("Kentucky Stone") is a wholly owned subsidiary of the Kopper's Corporation and is located in Pulaski County, Kentucky.

3. The Kentucky Stone Corporation is engaged in limestone mining operations and is subject to the provisions of the Federal Mine Safety and Health Act of 1977, including § 815(c)(1). Further, Kentucky Stone falls within the definition of an "operator" as provided for in the Act.

4. Complainant was operating a Caterpillar 988A (Company No. 444) front-end loader, which was owned and/or leased by Kentucky Stone at the time of his discharge on May 2, 1985. At no time did Complainant refuse to operate the Caterpillar 988A (Company No. 444) front-end loader.

5. Dennis Halcomb was acting as an agent for Kentucky Stone when he fired Complainant.

Findings of Fact

1. Stanley Ray Baker, Complainant herein, was first employed at Kentucky Stone Company on September 17, 1976. While employed with Kentucky Stone Company, he has also operated a bulldozer and a "front-end loader" which, for the purpose of this proceeding, pertains primarily to the operation of a Caterpillar 988A loader.

2. A Caterpillar 988A loader is a large rubber-tired piece of equipment used, by Kentucky Stone Company in its quarrying operations, to load stone into the trucks hauling stone for its customers, to clear and organize stockpile of stone, and to clear roadways and pathways from spillage within the plant area.

3. Complainant has substantial experience operating front-end loaders, having previously operated a 980C Caterpillar, a 988B, and an H100, as well as a 275 Michigan, a 125 Michigan, a 175 Michigan, and other models of loaders.

4. Kentucky Stone Company, Respondent, at its quarry in Pulaski County, Kentucky, is engaged in the business of quarrying (mining) limestone rock from an open pit. When consumers purchase the rock, trucks are obtained to haul the rock from the "plant" at the quarry to the site designated by the consumer. Complainant's job included loading those trucks from the stockpiles. Some of the locations where the trucks parked to be loaded included grades. Loading the trucks requires the loader, with the bucket in a lowered position, to be driven into the stockpile to obtain limestone rock and to then be backed out of the pile, raising the bucket as the piece of equipment moves backward, and then maneuvering the loader into a position sufficient to permit the limestone rock to be dumped from the bucket into the truck. Throughout the time that the loading of the truck occurs, the loader is kept in first gear. The distance of travel is some 10 to 20 feet and the brakes of the loader are usually applied 8 to 12 feet before reaching a truck bed .

5. Occasionally, Complainant took the loader into the pit to clear off areas in the pit, or on shelves, to provide areas for the rock drills to drill, or he would haul fuel into the pit area.

6. The loader is used, from time to time, to "push off the stockpiles." This means that the crushed material is dumped on the stockpiles and then has to be organized or pushed around on the stockpiles to permit the piles to be orderly and usable. Roadway grading with the loader involves filling small potholes that occurred in the roadways, and clearing haul roads .

7. It was Baker's responsibility to watch the quarry site for trucks which were seeking to be loaded and to load them promptly in order to avoid delaying other trucks seeking to be loaded.

8. Baker testified that he was required to complete a daily checklist on every piece of equipment that he operated, and that he always filled it out.

9. Prior to operating the 988A loader, which is principally the subject matter of this action, Baker operated a 980C loader, which was a later model loader. On the April 24, 1985, Baker marked the brakes on the 980C loader "inoperable" and that loader was taken out of service and sent off to a shop for repairs. He was then assigned to the 988A loader and continued running it until the end of the shift.

10. The safety checklist, designed and supplied by Respondent, contains two columns for marking. One column is headed "OK" and the other column is headed "INOP." Mr. Baker believed that "INOP." meant "improper" (Tr. 120) or "inoperable" (Tr. 121). Neither side of this form contains any space specifically designated for comments.

11. On the date that he first operated the loader, Baker claimed the brakes would not catch properly when they were applied and that the loader would continue to roll 5 to 10 feet. He testified, in essence, that the distance the loader rolled after the application of the brakes varied. Baker testified that because of the condition of the brakes, he was concerned for his safety because if the brakes did not catch, the loader would roll, possibly backwards into a stockpile or forwards into the side of a truck. Once the loader stopped it did so abruptly. This created a danger because the loader bucket often held 10 to 12 tons of gravel in the air while loading a truck. The sudden stop would shift the weight of the bucket and thus force the back wheels of the loader to lift off the ground, causing the gravel to scatter into the objects below. Baker was concerned that the gravel would damage the trucks and injure the truck drivers who were on the ground below. Baker said he had trouble with the windshield wiper, that the windshield was cracked, and that he also marked problems with one mirror and an accessory ladder. He also claimed he was having problems with the steering, but that he did not report the problems with the steering because there was no place on the safety checklist to report problems with steering. He alleged he did tell the Superintendent, Dennis Halcomb, he was having problems with the steering and that he also told the on-site mechanic, Glennis Miller, of such problems.

12. The safety checklists are posted on clipboards and hung on a wall in the shop.

13. Baker testified that Glennis Miller indicated on one of the early days of his usage of the loader that there was a "problem" with the brakes (Tr. 129). Also, Baker said that Sherman McClure said the brakes were "no good" and they "wouldn't catch when you first hit them" (Tr. 129). Baker also claimed that the brakes wouldn't hold, so he attempted to use the fuel control to hold the loader in place. For safety reasons, Baker did alter the way he loaded trucks. Baker normally loaded trucks on an incline so that his loader would be above (on the upper side of) the truck. After Baker detected problems with the brakes, he reversed this process and began loading from below the trucks. He also positioned his loader so that if the brakes did not catch he would roll backwards into a pile of gravel to cushion his stop.

14. Baker denied anyone inspecting the brakes on the first day that he marked the safety checklist.

15. Baker continued to operate the loader on Monday, April 30. Baker denied that anyone from Kentucky Stone Company talked to him about the brakes on the second day of operation. Two sets of checklists were marked on April 30. In filling out the checklists, throughout the entire time that he operated the 988A, Baker continued to mark the brakes "INOP."

16. Baker acknowledged that he discussed the brakes of the loader with Glennis Miller, on-site mechanic, on the first or second day that he had operated it, and told him the loader would roll before the brakes caught. Baker denied that anyone got on the loader or stood by and watched him operate the loader on the first or second day.

17. When Dennis Halcomb, Respondent's Superintendent, first received a form indicating the 988A brakes were marked "INOP.", he went to talk to Baker and was told that the brakes were inoperable. Halcomb told Baker that he would have the mechanic check the brakes. Halcomb said the mechanic, Glennis Miller, got on the loader, drove it into the pile, backed out, checked the brakes, oil, fluid, and other items to determine if there was a problem, taking approximately 10 to 15 minutes. Halcomb said Miller reported to him that there was nothing wrong with the brakes.

18. On the next day, Halcomb again had Glennis Miller check the brakes. Miller said Baker was present, but did not tell him there was anything wrong with the way he was testing the brakes. Halcomb said Miller reported back that the brakes had nothing wrong with them and that he suspected that Baker had been used to the disc brakes on the 980 loader which catch more quickly than the ballon-type brakes on the 988A. Halcomb said he told Baker what Miller said about the brakes.

However, based upon observations of his demeanor, I placed more weight on the testimony of Miller as to what he actually did. I find thus that all Miller did was to travel forward with the loader and hit the brakes two to three time. He noted after the brakes were applied, the loader would roll a few feet before stopping and he told this to Baker stating there was a problem, although he did not say the brakes were unsafe. He also noted the loader stopped in the same distance at the same speed each time and that there was no inconsistency in stopping distance.

19. On the third day, another complaint was made regarding the brakes and Halcomb felt that the machine could not continue to be operated with the brakes designated as inoperable as a

violation of MSHA policy. Miller checked the brakes again the same way he did the two previous days. Halcomb then contacted Herbert Ray Robbins, Mechanic Superintendent over the Eastern Division of Kentucky Stone Company at the Mt. Vernon Shop.

20. Robbins began to operate the loader, putting it in first gear, revving it up, then letting off the throttle and hitting the brake. He applied the brakes just one time. He found "that the brakes were still plenty safe to operate" (Tr. 566). He also tested the right brake by putting his left foot on the right brake and revving the engine to about half throttle to determine whether the brakes would hold, finding the brakes held it OK. He then told Baker "it was okay to go ahead and run it" (Tr. 569), and told Halcomb that he would give the loader a thorough check when it was taken into the shop, but he did not see any reason to take it to the shop at that time, and said there was no reason to take it out of production. Halcomb was told that it was okay to run it and that it was safe to run, but Robbins said the brakes were not as fast catching as a 980 loader with disc brakes.

21. On the last day that Baker worked, May 2, 1985, he marked the brakes "INOP." but continued to use the loader. Miller got on the loader and there was no difference in the operation of the brakes from the previous examinations, indicating that the delay in stopping was 2 to 3 feet and never 10 or 12 feet. This distance was within the normal limits established in the testimony of Complainant's expert, Mark Leuking. At about 11:00 a.m., Halcomb told Baker he (Halcomb) was sure there was nothing wrong with the brakes and that Baker was marking the checklist "false" (Tr. 438). According to Baker, Halcomb informed him that he will have to let him to go. According to Halcomb, he told Baker that if he (Baker) did not want to talk about it and work something out "I would let him go" (Tr. 438). Based on observations of Baker's demeanor, I adopt his version. Baker left and has not subsequently been employed by Kentucky Stone Company.

22. The Caterpillar 988A loader has two brakes. One brake, located on the right hand side of the steering column, applies immediate braking pressure and does not take the piece of equipment out of gear. The other brake, known as the "D-clutch," first takes the piece of machinery out of gear, then permits the engine to be revved to permit raising of the bucket, and then begins braking. It is customary in Caterpillar 988A loaders for the braking process on the application of a D-clutch to be slightly delayed.

23. On cross-examination, the Complainant acknowledged that no one informed him that the brakes on the 988A were unsafe.

24. Roger Hasty was working for Respondent at the time of the discharge of Baker. Hasty indicated that he operated the 988A for several days, approximately 2 weeks, after Baker was

dismissed, and he had some problem with the loader stopping inconsistently. Because of this inconsistency he placed his loader on the lower side of the truck when loading on a hill side. Hasty did not fill out a safety checklist for the 988A loader.

25. Sherman McClure, an employee of Respondent, was working at the Pulaski Plant in 1985. He operated the 988A loader approximately 2 or 3 weeks after the discharge of Baker, and felt something was wrong with the brakes because they would roll 1 to 4 feet before coming to a complete stop, at which time they would hold firmly. Even though McClure did not usually fill out checklists, he indicated that he would have "probably" marked the brakes inoperable had he been requested to fill out a safety checklist (Tr. 286). During the time that he operated it, he felt that he was familiar with the length of the roll upon application of brakes and that the rolling was something that he had been able to get used to.

26. Melvin Thomas has worked for Kentucky Stone Company for 22 years and works as a mechanic at the Mt. Vernon Shop. He recalls being on the loader at approximately the same time Baker was discharged and recalls that when the brakes were applied, the loader went approximately 3 feet and then stopped.

27. Mark Leuking was presented as an expert for the Complainant. He has worked with two 988A loaders and operated one on a daily basis. He experienced situations in which the brakes on a 988A would permit rolling of varying distances before the brakes caught.

28. Dale Tabor, Johnny Bruner, and Donnie Tabor all essentially noted that Baker, in loading their trucks with the 988A loader, placed his loader below their trucks while loading on an incline.

29. When a piece of equipment is transferred in or out of a particular Kentucky Stone location, the Office Manager sending out the piece of equipment fills out a transfer form, based upon instructions from the Superintendent, and then when the piece of equipment is received, the receiving Superintendent also inspects the equipment. Each plant has its own costs charged to that particular plant. At the time the 988A loader was received in the Pulaski Plant, nothing was found wrong with it on inspection. At the time it was shipped out, there was likewise nothing indicated to be wrong with the equipment.

30. On the day that Stanley Baker was discharged, Danny Roberts, another loader operator, operated the loader for the rest of the day and for an additional period thereafter. During the period of time that Roberts operated the loader, nothing was

indicated on any checklist to indicate that the loader brakes were inoperable. In the testimony of Roberts, he indicated that the travel on the loader when the brakes were applied, was customary and usual for a 988A and that the travel did not create a danger. The length of travel was consistent. Roberts had no trouble with the brakes during the period of time that he operated the equipment until it was transferred to Tyrone. Checklists for May 21, 22, 23, 24, 28, 30, and 31 and June 1, 3, 4, 5, 6, 7, and 8, all signed by Russell Hines, indicate the brakes were marked "OK."

31. The 988A loader was received on April 1, 1985, from Yellow Rock, near Beatyville, Kentucky, and was shipped to Tyrone, near Lawrenceburg, Kentucky, on May 7, 1985. It was shipped back to the Pulaski Plant on May 13, 1985, and remained in Pulaski County until June 20, 1985, when it was shipped to the Mt. Vernon Shop. The starter and electrical system were repaired at that time, and the brakes were serviced. No problems were reported with the brakes from the time the loader was received on May 13 until it was shipped to Mt. Vernon on June 20.

32. Halcomb also indicated that he had had certain previous problems with Baker, including cleaning up stone in the traveled areas to prevent customers' trucks from having to back their tires over them; problems with keeping Baker watching for trucks; problems with Baker being in the Control Room; problems with Baker leaving his loader; and problems with Baker not doing a good job servicing his loader. He also recalled a problem of excessive speed which resulted in damage to the pick-up truck belonging to Roberts.

33. Halcomb indicated that he would not have "sent (Baker) home if it hadn't been for the false check sheets" (Tr. 460).

34. Halcomb testified that Baker had at least two and maybe three warnings before the day that he filed the last checklist and was discharged. Halcomb said that throughout that time, Baker did not tell him that the loader brakes were inconsistent and did not stop the same way every time, although he had several opportunities to do so. Halcomb said he first heard Baker claim a variation in the way the brakes stopped on the first day of the trial proceedings. According to Halcomb, Baker did not tell Miller or Robbins of variations in the brakes at the time of stopping. In contrast Baker testified, in essence, that he told Miller the loader rolled before the brakes caught. I adopt Baker's version due to my observations of his demeanor and also as it finds some corroboration in the testimony of Miller that he checked the stopping distance of the loader.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

2. If so, whether the Complainant suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Discussion

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

> A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

Protected activity

The key issue presented for resolution is whether Baker was engaged in a protected activity when he checked the brakes "INOP.", on the daily safety checklist. In essence, according to Baker, he initially marked the brakes on the 988A front-end loader as being "INOP.", as it continued to roll between 5 and 12 feet after application of the D-clutch brake petal, and that when the brakes did catch they would catch suddenly. Also, according to Baker, the distance that the brake on the front-end loader would roll upon application of the D-clutch was inconsistent.

Baker continued to mark the daily safety form up to and including the date of his discharge as indicating the brakes being "INOP." as the brakes continued to perform in the fashion that they had on the first day. According to Baker, he was concerned with the hazard of being unable to stop upon approaching a

truck down the incline or upon working leveling at the top of the stockpile. Halcomb, in essence, testified that marking the brakes as being "INOP." was false, especially after he had Miller drive it on three occasions after Baker had marked them to be "INOP.", and Miller had said that he could not find anything wrong with the brakes. However, according to Baker, Miller had told him that the brakes are not catching like they ought to. This is corroborated by Miller who indicated, upon cross examinations, that he told Baker that there was something wrong with the brakes. Thus, I adopt Baker's version of what Miller told him, rather than the version of Halcomb that he told Baker that Miller told him that he could not find anything wrong with the brakes.

Habcomb testified that upon driving the front-end loader Robbins had told him that the brakes were not as fast at catching as the 980 with the disc brakes and that he sure he told that to Baker. Robbins said he found that upon stopping, the brakes were plenty safe to operate and stop within a acceptable stoppage. Also, he said that any traveling of the loader upon the application of the brakes was consistent and could be adjusted to. He also opined that he could not find any danger with this traveling. Robbins had testified that he told Baker that the brakes were OK and to run the loader.

Although Robbins indicated the brakes were OK, he did not contradict the testimony of Baker on direct that specifically he (Robbins) had told him that the brakes did not catch like they ought to and that he was going to have to put on a booster on them. Also, although Robbins and Miller presented testimony at variance with Baker with regard to the distance that the 988A rolled upon application of the D-clutch and as to whether the distance of the roll was consistent or not, I note that Robbins tested it only once. Also, there is a no evidence that either Miller or Robbins drove the front-end loader under the conditions driven by Baker, i.e. loaded and down a incline. In this connection, I find that the testimony of Baker that Robbins tested the loader by driving it on the level around a pile to be uncontradicted.

In addition, in evaluating whether Baker had good cause to believe the brakes were not "OK" and were "INOP.", I placed more weight upon the testimony of Hasty and McClure, based on their demeanor, rather than on the testimony of Miller and Robbins. In this connection, I noted that Hasty corroborated Baker's testimony that the brakes were inconsistent and that once they caught they caught suddenly. Also, McClure, who similarly operated the 988A after Baker was fired, opined that something was wrong with the brakes and that he would have marked the safety form as "INOP.", as would have Hasty. Also, I find significant that Hasty, like Baker, placed the trucks that he loaded uphill from the loader as

did Baker upon transferring to the 988A. Indeed, Baker's action in this regard was corroborated by Dale Tabor, Donny Tabor, Jack Bruner. Also, Melvin Thomas, a mechanic at the Mount Vernon plant under Robbins, had indicated that when he drove the 988A about the time when Baker was fired it rolled and stopped suddenly. Although he indicated that the rolling of the loader approximately 3 feet before it stopped was consistent, he opined that the loader in question takes longer than usual to stop than other 988As, and therefore that the brakes were not working properly and that there had to be something wrong.

Accordingly, I conclude that Baker operated in good faith in checking the brakes as being "INOP." (See, Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981)). No bad faith can be found by Baker not following the opinions of Miller and Robbins. Neither of them actually operated the front-end loader while driving loaded down an incline, and neither of them physically performed any mechanical investigation or examination of the braking system. I find that the record does not present sufficient evidence to conclude that Baker's motivation in checking the brakes as being "INOP.", was as a result of other than safety concerns. Accordingly, I find that Baker engaged in protected activity in filling out the daily safety forms during the period that he was riding the 988A loader, and marking the brakes as "INOP." (Robinette, supra).

Motivation

I find that when Halcomb sent Baker home on May 2nd, 1985, that Baker was, in essence, fired and that this constitutes an adverse action. Halcomb testified, in essence, that when he sent Baker home on May 2, 1985, for,in his opinion, falsely filling out the daily checklist, it was the straw that broke the camels back. When asked whether the sole reason for firing Baker was the false checklist, he indicated in the affirmative and "the other stuff building up to it too." (Tr. 504) In this fashion, he indicated various other complaints that he had with Baker including Baker not cleaning up stones on the road, not servicing the loader properly, driving the loader at a unsafe speed, being in the control room (an unauthorized location), and not being available when needed to service truckers. However, there is no evidence that respondent would have fired complainant for these activities alone. Indeed, when asked why Baker was fired Halcomb indicated that he was sent home "mostly" for filling out the false truck sheets and that there were no other reasons "at that time," (Tr. 460). Also, I find it most significant that when asked whether the other problems he had been having with Baker affected him in any way in determining to send Baker home on May 2, he said as follows: "No, I don't think I would have sent him home if it hadn't been for the false check sheets," (Tr. 460).

Thus, based upon the testimony of Halcomb I conclude that the complainant here has established that the firing was motivated in any part by the protected activity. (See, Robinette, supra.)

Respondent has not rebutted the prima facie case. Indeed the evidence establishes that the sole motivation for the firing of complainant on May 2, was the protected activity. I also find that an affirmative defense of respondent cannot be sustained, as the evidence fails to establish that respondent would have fired complainant based on the nonprotected activities alone. (Robinette, supra.)

Therefore I conclude that complainant has established a cause of action under section 105(c) of the Act. In light of this conclusion, Respondent's Motion, made at the Hearing for a directed opinion, is DENIED.

ORDER

1. Complainant shall file a statement within 20 days of this decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney's fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

2. This decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay and attorney's fees.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUL 28 1988

THE HELEN MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 88-52-R Citation No. 2881573; 10/27/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 88-53-R Citation No. 2881574; 10/27/87
	:	Docket No. PENN 88-54-R Citation No. 2881575; 10/27/87
	:	Docket No. PENN 88-55-R Order No. 2881576; 10/27/87
	:	Docket No. PENN 88-56-R Citation No. 2881577; 10/27/87
	:	Docket No. PENN 88-57-R Citation No. 2881578; 10/27/87
	:	Homer City Mine Mine ID 36-00926
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 88-219 A.C. No. 36-00926-03737
v.	:	Homer City Mine
THE HELEN MINING COMPANY, Respondent	:	

DECISIONS

Appearances: Ronald B. Johnson, Esq., Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt, Wheeling, West Virginia, for the Contestant/Respondent;
Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern six Notices of Contests filed by the Helen Mining Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the validity of four section 104(a) citations, with special "significant and substantial" (S&S) findings, one section 104(a) non-S&S citation, and one section 104(d)(2) order, issued at the mine on October 27, 1987. All of the contested citations and order were issued following a fatal accident investigation conducted by MSHA. A hearing was convened in Indiana, Pennsylvania, on June 21, 1988, and the parties appeared and participated fully therein. The parties waived the filing of any posthearing briefs, and relied on the record made in the course of the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these proceedings are as follows:

1. Whether or not the conditions and practices cited in the citations and order constituted violations of the cited mandatory safety standards and the Act, and if so, the appropriate civil penalty assessments that should be assessed against the Helen Mining Company, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

2. Whether the inspector's special "significant and substantial" findings should be affirmed, and whether his "unwarrantable failure" finding with respect to the contested order should likewise be affirmed.

Discussion

The essential facts surrounding the fatality which prompted an MSHA accident investigation and resulted in the

issuance of the contested citations and order are not in dispute. The record reflects that on October 25, 1987, a miner was fatally injured when a runaway locomotive and trip of cars crashed into a parked personnel carrier causing it to jump the track and strike the miner. At the time of the accident, the miner was performing work in connection with the repair of the track in the vicinity of the parked personnel carrier.

Prior to the taking of any testimony in these proceedings, and in the course of a brief bench pre-trial conference with counsel for the parties, they advised me that after further discussions and negotiations, the parties proposed to settle all of the contested citations and order, and they were afforded an opportunity to present their oral arguments on the record in support of their joint proposals (Tr. 5). A discussion concerning the contested citations and order, including the arguments presented by the parties in support of their settlement proposals, follows below.

Docket No. PENN 88-56-R

In this case the inspector issued a section 104(a) "S&S" Citation No. 2881577, on October 27, 1987, charging an alleged violation of the safeguard requirements of 30 C.F.R. § 75.1403, and the condition or practice is described as follows:

> Material in the form of a 6' long track rail was being transported on the top of a Galis battery jeep TP7, serial no. 130-270115. This information was revealed during a fatal accident investigation.

In issuing the citation, the inspector made reference to a previously issued safeguard Notice No. 0616506, issued on January 30, 1979, pursuant to 30 C.F.R. § 75.1403-7(o), which provides as follows:

> Extraneous materials or supplies should not be transported on top of equipment; however, materials and supplies that are necessary for or related to the operation of such equipment may be transported on top of such equipment if a hazard is not introduced.

MSHA's counsel moved that the contested citation be vacated, and in support of this request, counsel asserted that based on interviews with the miners, as well as further discussions with the operator, the six-foot rail which was being transported on the jeep was securely placed and posed no

hazard to any of the miners who were also being transported by the jeep. Under the circumstances, counsel asserted that the facts and circumstances presented do not establish a violation of the safeguard provision relied on by the inspector in support of the citation (Tr. 7-8).

After due consideration of the oral motion to vacate the citation, it was granted from the bench, and my ruling is herein reaffirmed (Tr. 9). Accordingly, Citation No. 2881577 IS VACATED, and MSHA's proposal for assessment of a civil penalty IS DISMISSED.

Docket No. PENN 88-57-R

In this case the inspector issued a section 104(a) non-"S&S" Citation No. 2881578, on October 27, 1987, citing a violation of section 103(k) of the Act, and the condition or practice cited is described as follows:

> 103(k) order no. 2881572 issued 10-25-87 following a fatal accident was not complied with during the 8:01 AM to 4:00 PM shift on 10-26-87 in that a 15 ton Goodman locomotive serial no. 437-366 was moved 500 feet to the motor barn. Galis battery jeep TPS serial no. 130-270116 and W.Va. Armature jeep TP 12 serial no. 2000766 were removed from the accident scene approximately 1,000 feet. In the left bottom 5 supply cars were moved approximately 1,600 feet to the no. 6 side track, and a closed area between no. 3 belt station box and 3C switch along the South main track was entered by unauthorized person and rehabilitation work done at the accident scene. 103 K order no. 2881572 was not modified or terminated to allow any of the above work to be performed.

Section 103(k) of the Act provides as follows:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal

or other mine or return affected areas of such mine to normal.

MSHA's counsel asserted that no proposed civil penalty assessment was filed with respect to the contested citation, and that the citation was subsequently vacated by the inspector on March 22, 1988 (exhibit P-1). The justification by the inspector for vacating the citation states as follows:

> 104(a) Citation No. 2881578 issued on 10-27-87, for a violation of 103(k) of the Act is vacated. Upon review and discussion it was determined that company personnel could have interpreted that MSHA was in agreement with the State mine inspector that the investigation of the equipment involved in the accident had been completed and the equipment could be moved.

MSHA's oral motion to dismiss this case on the ground that the contested citation has been previously vacated was granted from the bench (Tr. 9-10), and my ruling in this regard is herein reaffirmed. This case IS DISMISSED.

MSHA's counsel stated that the remaining contested citations and order were issued as a result of a fatal accident which occurred at the mine on October 25, 1987. He explained that three workers were repairing a track haulage rail when they suddenly discovered that some equipment was moving on the rail toward them. All of the workers, except for the accident victim, were able to get out of the way of the moving equipment. The victim was struck by a TP-8 jeep personnel carrier which had been parked on the rail approximately 15 feet from where the work to repair the broken rail was being performed. That particular jeep was struck by a second TP-7 jeep parked on the rail, and it was struck by the moving equipment consisting of a trip of five supply cars and a locomotive that were all moving together towards the accident scene. Each of the contested citations and order concern certain alleged violative conditions with respect to each of these vehicles (Tr. 12).

Docket No. PENN 88-52-R

In this case the inspector issued a section 104(a) "S&S" Citation No. 2881573, on October 27, 1987, citing a violation of the safeguard requirements of 30 C.F.R. § 75.1403, and the condition or practice cited is described as follows:

> The safety chain for the brake wheel of the 15 Ton Goodman battery locomotive, serial no. 437-366, was not attached to the brake wheel when the locomotive was parked on the track haulage at the motor barn area of the shaft bottom. This condition may have been a contributing factor to the cause of a fatal accident that occurred on 10-25-87. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector made reference to a previously issued safeguard Notice No. 2 TJS, issued on February 5, 1974, (Exhibit G-3). That safeguard required that all track locomotives be maintained in a safe operating condition.

MSHA's counsel moved to amend the proposed civil penalty assessment for this violation from $3,500 to $500. In support of the motion, counsel stated that the original assessment was based on the conclusions made in MSHA's accident report of investigation that the failure to connect the safecy chain to the braking wheel used to prevent the wheel from moving once the brake is engaged caused the accident.

Counsel pointed out that the citation states that the failure to connect the safety chain may have been a contributing factor to the accident, rather than the cause, and that MSHA now concedes that the failure to connect the chain may or may not have been a contributing factor.

Counsel explained further that the locomotive was equipped with thee braking systems consisting of an electrical braking system, a pneumatic air-powered system, and a mechanical system similar to an emergency brake on a car. The pneumatic brake would be used to engage the brake shoes to make contact with the locomotive wheels. The mechanical wheel in question would be turned to prevent the brakes from moving. Once this wheel was turned and set, the chain would then prevent it from moving. However, the use of the chain alone would not have prevented the locomotive from moving, and even if it were attached to the wheel, it would not have prevented "a runaway." MSHA now believes that the cause of the accident was the failure to place blocking material to prevent the locomotive and supply trip from moving (Tr. 13-17).

Helen Mining's counsel stated that the wheel in question is a self-locking mechanism, and if the wheel is turned tight, it would be impossible for it to turn on its own, and the

chain simply prevents the wheel from moving further. Since the wheel cannot move on its own, the chain would be meaningless in terms of its relationship to the accident (Tr. 48-49).

MSHA's counsel confirmed that a safety chain was in fact provided for the cited locomotive, but was not used, and that in the case of the underlying safeguard notice issued in 1974, no chain was provided at all (Tr. 49). Counsel also confirmed that aside from the safety chain, the locomotive was inspected by MSHA and found to be in a safe operating condition, and the mechanical braking mechanism was operable. In addition, the brake pads and linkage were also inspected and found to be in proper operational condition (Tr. 51).

Docket No. PENN 88-53-R

In this case the inspector issued a section 104(a) "S&S" Citation No. 2881574, on October 27, 1987, citing a violation of the safeguard requirements of 30 C.F.R. § 75.1403, and the condition or practice is described as follows:

> There were 5 loaded supply cars consisting of 3 cars of concrete block and 2 cars of wooden crib blocks and a 15 ton Goodman locomotive standing on the track in the chute between the 2 West track and the South main track, and the cars were not blocked. This condition may have been a contributing factor to the cause of a fatal accident that occurred on 10-25-87. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector relied on a previously issued safeguard Notice 1 TJS, December 26, 1983, requiring that standing cars on any track be properly blocked or dragged.

MSHA's counsel took the position that had the locomotive and the 5-car trip been properly blocked there would have been no movement of the equipment and no accident (Tr. 17). However, counsel moved to amend the proposed civil penalty assessment from $3,500 to $2,500, and in support of this motion, asserted that contrary to the special assessment narrative findings that the three miners working on the track rail were not normally assigned to those duties, and that the foreman should therefore have instructed them on safe work procedures, including the blocking of the trip of cars, the facts disclosed that two of the miners, including the accident victim R. D. Schaffer, were locomotive motormen with approximately

18 years of mining experience, and that the other miner was a trackman.

Counsel stated that while it may be true that the three miner's were not normally assigned to do track repair work, their regular work assignments as motormen and trackmen required them to be familiar with the necessity for blocking haulage equipment against possible movement, particularly in the case of the two motormen who had over 18 years of experience. Based on interviews with witnesses, counsel stated that contrary to MSHA's special assessment narrative statement, the miners in question knew that the equipment needed to be blocked, and they failed to insure that this was done either through a mistake or inadvertence. Counsel proffered that if called to testify, one of the witnesses, William Knesh, who was present in the courtroom, would so testify. Mr. Knesh was the locomotive operator when it was parked, and he would testify that he yelled to the accident victim to make sure to block the cars, saw him duck behind the cars while bending over, and he assumed that he had blocked the cars against movement (Tr. 18-22).

MSHA's counsel also pointed out that although the investigating team could find no evidence of any blocking material at the time of the investigation, since the equipment had been moved during the rescue of the victim, any blocking materials which may have been present would also have been moved (Tr. 22).

Docket No. PENN 88-54-R

In this case the inspector issued a section 104(a) "S&S" Citation No. 2881575, on October 27, 1987, citing a violation of the safeguarding requirements of 30 C.F.R. § 75.1403, and the condition or practice is described as follows:

> The Galis battery jeep TP8 serial no. 130-270116 was parked on the track haulage at 4 left crossing and was not blocked when not in use. This information was revealed during a fatal accident investigation.

In support of the citation, the inspector relied on a prior safeguard Citation No. 2254834, April 26, 1984, issued pursuant to 30 C.F.R. § 75.1403-10(e), and which required positive acting stopblocks or derails for all mine haulage equipment.

MSHA's counsel proposed no changes for this citation and stated that Helen Mining Company has agreed to pay the full amount of the proposed civil penalty assessment of $136 (Tr. 23). The parties offered supporting arguments for my approval of this settlement (Tr. 24-27).

Docket No. PENN 88-55-R

In this case the inspector issued a section 104(d)(2) Order No. 2881576, on October 27, 1987, citing the safeguard requirements of 30 C.F.R. § 75.1403, and the condition or practice is described as follows:

> The Galis battery jeep TP7 serial no. 130-270115 was parked on the track at the motor barn area by Sam Ferguson, Foreman, and was not adequately blocked in that a cap wedge was used for blocking. This condition may have been a contributing factor to the cause of a fatal accident that occurred 10-25-87. This information was revealed during a fatal accident investigation.

In support of the order, the inspector relied on a previously issued safeguard Notice No. 2254834, April 26, 1984, requiring the blocking of all haulage equipment when it is not in use. This safeguard was issued when an inspector found that a shuttle car was not provided with positive active stopblocks.

MSHA's counsel pointed out that this violation concerns inadequate blocking for the TP-7 jeep, and that the jeep was in fact blocked with a cap wedge. Counsel conceded that the cited condition may or may not have contributed to the accident. Counsel also pointed out that the safeguard upon which the order was based applied to a shuttle car, and it did not specify the appropriate method for blocking a jeep. Under the circumstances, counsel moved to modify the order to a section 104(a) citation, and to amend the proposed civil penalty assessment from $3,500 to $500.

In support of the motions, counsel asserted that the lack of any specific notice in the underlying safeguard as to the type of blocking which would be considered adequate for the jeep does not support the unwarrantable failure order. Further, counsel asserted that the facts establish that a wooden wedge was used under the wheel of the jeep, and that coupled with the fact that the jeep was braked, it was highly unlikely

that the jeep would have moved on its own had it not been struck by the runaway trip of cars (Tr. 28-38).

MSHA's counsel confirmed that the inspectors who issued the citations and order and conducted the accident investigation were present in the courtroom, and that they concurred with the settlement proposals advanced by the parties (Tr. 41-42). The parties also confirmed that the arguments presented on the hearing record in support of their joint settlement proposals in these proceedings would be corroborated by their respective witnesses who were present in the courtroom in the event they were called to testify (Tr. 51).

The parties submitted information concerning Helen Mining's history of prior violations, mine production information, and the size and scope of its mining operation (Tr. 57; Exhibits G-4, G-5, and G-6), and I have considered this information in approving the proposed settlements. I have also considered the inspectors' negligence and gravity findings as reflected by the contested citations and amended order, and take note of the fact that all of the contested violations were timely abated in good faith by the mine operator.

After due consideration of the arguments presented by the parties, MSHA's oral motions for approval of the settlements and to amend its civil penalty proposals for Citation Nos. 2881573, 2881574, and 2881576, and to modify section 104(d)(2) Order No. 2881576 to a section 104(a) citation were granted from the bench (Tr. 43-44, 54). With regard to the settlement proposal for Citation No. 2881575, requiring Helen Mining Company to pay the full amount of the $136 civil penalty assessment for the violation in question, the settlement proposal was likewise approved from the bench (Tr. 43).

Conclusion

Pursuant to the requirements of Commission Rule 30, 29 C.F.R. § 2700.30, and after careful consideration of the pleadings and arguments in support of the proposed settlement dispositions agreed to by the parties, I conclude and find that they are reasonable and in the public interest and they are approved. Accordingly, my bench decisions in this regard ARE REAFFIRMED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) Citation No. 2881577, October 27, 1987, 30 C.F.R. § 75.1403, Docket No. PENN 88-56-R, IS VACATED, and MSHA's

proposed civil penalty assessment IS DISMISSED. Helen Mining Company's Notice of Contest IS DISMISSED.

Section 104(a) Citation No. 2881578, October 27, 1987, Docket No. PENN 88-57-R, citing an alleged violation of section 103(k) of the Act has been previously vacated by MSHA and no proposed civil penalty assessment was filed. Accordingly, Helen Mining Company's Notice of Contest IS DISMISSED.

All of the remaining contested and settled citations not otherwise dismissed or vacated ARE AFFIRMED, and Helen Mining Company IS ORDERED to pay the following civil penalty assessments in satisfaction of the violations in question within thirty (30) days of the date of these decisions and order:

Docket No.	Citation No.	Date	30 C.F.R. Section	Assessment
PENN 88-52-R	2881573	10/27/87	75.1403	$ 500
PENN 88-53-R	2881574	10/27/87	75.1403	$2,500
PENN 88-54-R	2881575	10/27/87	75.1403	$ 136
PENN 88-55-R	2881576	10/27/87	75.1403	$ 500

In view of the settlement disposition of the aforementioned dockets, Helen Mining Company's Notices of Contest ARE DISMISSED.

George A. Koutras
Administrative Law Judge

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